85-1032

No.

Supreme Court, U.S.
FILED
DEC 18 1985
JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

M.J.M. EXHIBITORS, INC.,

Petitioner,

— against —

WILLIAM J. STERN, individually and as Chairman of the New York State Urban Development Corporation, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RALPH J. SCHWARZ, JR.
Attorney for Petitioner
122 East 42nd Street
Suite 2117
New York, New York 10168
(212) 867-8850

Of Counsel:
RALPH J. SCHWARZ, JR.
KEITH N. COSTA
STEWART STONE

December 11, 1985

98P

QUESTIONS PRESENTED

The City of New York and the State Urban Development Corporation ("UDC") use condemnation to eliminate Times Square physical blight, crime and "undesirable uses." The Project claims that adult uses contribute to blight. The District Court found that they do not. Nonetheless the Project mandates replacement by "legitimate" tenants only for speech uses. The District Court found "official hostility" to adult uses. The Project eliminates 65% to 70% of all peep machine 8 mm. film exhibition in adult stores. City zoning prohibits their relocation. The questions are:

1. Is the District Court's finding that adult uses do not contribute to blight immaterial under the First Amendment as the Second Circuit held (a) by relying on *Young* but ignoring its fact predicate that a concentration of adult theaters causes crime, and (b) then justifying speech extermination based solely on the due process rationally related test?

2. Where the District Court finds "official hostility" to adult uses, the Second Circuit acknowledges "subjective motivation" of some Project planners to destroy speech, and the Project proclaims "desirable" tenants must replace only speech uses to eliminate blight they do not cause but makes no such command for the 400 other businesses being replaced, is this Project "unrelated to the suppression of free expression" and content neutral under the First Amendment and Equal Protection clause? Is motive to destroy speech irrelevant as the Second Circuit holds?

3. Where the Project will result in a 65% to 70% reduction of peep machine exhibition of adult 8 mm. films and City zoning prohibits their relocation, is this permissible under the First Amendment because the public has access to swingers clubs, to dance halls, to topless bars (none of which exhibit 8 mm. films), to movie theaters, which exhibit 16 or 35 mm. films for over an hour at a cost of $5 to $6, and to "exhibition *** [by] books, magazines ***"?

4. Where the undisputed record shows that a less intrusive measure of police sweeps has been successfully employed to eradicate crime outside the Project area, may the Second Circuit disregard this under the First Amendment?

5. Where there is a preliminary injunction motion and opposing affidavits, is it permissible for the District Court sua sponte, without any warning and without a Rule 56 motion, to convert a 12(b)(6) motion to dismiss into summary judgment?

PARTIES TO THE PROCEEDINGS

In addition to William J. Stern the following are respondents in this court; William H. Daly, individually and as Director of the Office of Midtown Enforcement of the City of New York, Steven Spinola, individually and as President of the Public Development Corporation of the City of New York, Herbert J. Sturz, individually and as Chairman of the City Planning Commission of the City of New York, Edward I. Koch, individually and as Mayor of the City of New York, The City of New York, Park Tower Realty Corp., Planning Innovations, Inc., Tishman Speyer Properties and Equitable Life Assurance Society of the United States.

Petitioner has no parent, subsidiary or affiliate.

TABLE OF CONTENTS

	PAGE NO.
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
Summary	3
Facts	4
REASONS FOR GRANTING WRIT	9
I. The Governmental Interest In Eliminating Blight By Ordering That Legitimate Stores Replace Adult Uses Which Do Not Cause Blight May Not Be Justified On Due Process Grounds	9
II. The Project Embodies Official Hostility to Adult Uses And Mandates Desirable Tenants Replace Only Speech Entities For Blight They Do Not Cause. The Project Is Not Unrelated To Suppression Of Speech, Is Violative Of The First Amendment And Equal Protection Clause, And Motive May Not Be Disregarded	11
III. There is an Unconsitutional Diminution of Public Access	14

PAGE NO.

IV. The Intentional Failure To Use The Less Drastic Means Of Police Sweeps Further Invalidates The Project 18

V. Most Circuits Hold That Presentation Of Matters Outside The Pleadings Does Not Permit Sua Sponte Conversion of a 12(b)(6) Motion Into Summary Judgment Motion. This Conflict and Important Recurring Problem Should Be Addressed 19

CONCLUSION 22

APPENDIX A –
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, Opinion below App-1

APPENDIX B –
UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, Opinion below App-27

APPENDIX C –
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, Petition for Rehearing Denial App-55

APPENDIX D –
FEDERAL RULES OF CIVIL PROCEDURE 12(b)(6) and 56, excerpts App-57

APPENDIX E –
LIST OF EXHIBITS SUBMITTED BY PETITIONER UNDER SEPARATE COVER AS PART OF ITS INITIAL OCTOBER 18, 1984 PRELIMINARY INJUNCTION MOTION App-58

PAGE NO.

APPENDIX F –
LIST OF RESPONDENTS' EXHIBITS ANNEXED TO THEIR NOVEMBER 21, 1984 DISTRICT COURT OPPOSITION PAPERS ... App-60

APPENDIX G –
PETITIONER'S EXHIBITS ANNEXED TO SCHWARZ DECEMBER 7, 1984 REPLY AFFIDAVIT (0-R) AND SUR-REPLY OF DECEMBER 27, 1984 (S) App-62

TABLE OF AUTHORITIES

A. Cases

	Page
Alexander v. City of Minneapolis, 698 F.2d 936 (CA 8 1983)	16
Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (CA 8 1981, en banc)	9, 10, 13, 16
Basiardanes v. City of Galveston, 682 F.2d 1203 (CA 5 1982)	10
Bayou Landing, Ltd. v. Watts, 563 F.2d 1172 (CA 5 1977)	13, 16
Berman v. Parker, 348 U.S. 26 (1954)	10
Bose Corp. v. Consumers Union of United States, Inc., ____ U.S. ____, 80 L.Ed.2d 502, 104 S.Ct. 1949 (1984)	18
In re Bristol Industries Corp., 690 F.2d 26 (CA 2 1982)	19
Bryson v. Brand Insulations, Inc., 621 F.2d 556 (CA 3 1980)	20
Capital Films Corp. v. Charles Fries Productions, Inc., 628 F.2d 387 (CA 5 1980)	20
City Council v. Taxpayers For Vincent, ____ U.S. ____, 80 L.Ed.2d 772 (1984)	13, 14
City of New York v. Rambling Ram Realty, S.Ct. N.Y.Co., Index No. 43556 (1981)	8
City of Renton v. Playtime Theaters, Inc., jur. noted, No. 84-1360, 85 L.Ed.2d 297 (1985)	12, 13
Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (CA 6 1975)	19

Page

Dolese v. United States, 541 F.2d 853 (CA 10 1976) 20

Ellwest Stereo Theatres Incorporated of Texas v. Byrd, 472 F.Supp. 702 (N.D. Tex. 1979) 16

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 14

Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (CA 2 1984) 17

Gay v. Wall, 761 F.2d 175 (CA 4 1985) 20

Genusa v. City of Peoria, 619 F.2d 1203 (CA 7 1980) 16

Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (CA 4 1979) 13, 16

Hawaii Housing Authority v. Midkiff, ___ U.S. ___, 81 L.Ed.2d 186 (1984) 10

Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 17

Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94 (CA 6 1981) 10

Macklin v. Butler, 553 F.2d 525 (CA 7 1977) 20

Milburn v. United States, 734 F.2d 762 (CA 11 1984) 20

Monroe v. Pape, 365 U.S. 167 (1961) 13

NAACP v. Alabama, 357 U.S. 449 (1958) 13

	Page
Parratt v. Taylor, 451 U.S. 527 (1981)	13
Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527 (CA 9 1984)	12
Police Department v. Mosley, 408 U.S. 92 (1972)	14
Purple Onion, Inc. v. Jackson, 511 F.Supp. 1207 (N.D. Ga. 1981)	15, 16
Quantity of Books v. Kansas, 378 U.S. 205 (1964)	16
Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981)	4, 9, 10, 14-17
Schneider v. State, 308 U.S. 147 (1939)	15
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)	15
United States v. O'Brien, 391 U.S. 367 (1968)	4, 11, 13
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	11-13
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)	10
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	10
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)	3, 4, 9-11, 14-16

Page

B Statutes

28 U.S.C.A. Sections 1254(l), 1331, 1243, 2201 and 2202 (1982) 2

42 U.S.C.A. Section 1983 (1982) 2

New York State Urban Development Corporation Act (UDC Act), Laws 1968, Chapter 174, Sections 1 through 36, 41B New York Consolidated Law Service (CLS) Chapter 252; McKinney's Unconsolidated Laws, Section 6251 et seq. 2, 13

Federal Rules of Civil Procedure 12(b)(6) 2, 19, 20

Federal Rules of Civil Procedure 56 ..... 2, 19-21

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

M.J.M. EXHIBITORS, INC.,

Petitioner,

– against –

WILLIAM J. STERN, individually and as Chairman of the New York State Urban Development Corporation, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner M.J.M. Exhibitors, Inc. ("MJM") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on August 8, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 770 F.2d 288. The opinion of the District Court is reported at 604 F.Supp. 898. The September 17, 1985 denial of petition for rehearing is unreported. They are all reprinted as Appendix A, B and C respectively, commencing with App-1.

JURISDICTION

Petitioner and other adult book stores exercising First Amendment rights in Times Square brought suit in the Southern District of New York, asserting a cause of action under 42 U.S.C. Sec. 1983 and invoking federal jurisdiction under 28 U.S.C. Sections 1331, 1343, 2201 and 2202. They alleged that the New York State Urban Development Corporation Act[1] (UDC Act) as applied by governmental officials in their Times Square Rehabilitation Project violated their rights under the First Amendment and Equal Protection Clause.

On February 5, 1985, the District Court denied petitioner's preliminary injunction motion and, without any Rule 56 notice, granted summary judgment for respondents. On August 8, 1985 the Circuit Court affirmed. A timely petition for rehearing and en banc review was filed and denied September 17, 1985.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution. It also involves 42 U.S.C. Sec. 1983, 28 U.S.C. Sections 1331, 1343, 2201 and 2202, the UDC Act (although there is no claim of its facial invalidity), as well as F.R.Civ.P. Rules 12(b)(6) and 56. The pertinent provisions of Rules 12(b)(6) and 56(c) and (f) are reproduced as appendix D.

---

[1] New York State Urban Development Corporation Act, Unconsolidated Laws, Sections 6251, et seq. (McKinney's 1979).

STATEMENT OF THE CASE

Summary

Because the documents are voluminous, this summary, including key Second Circuit egregious misapplications of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), may be helpful.

Petitioner and virtually all other 15 adult retail book stores targeted for destruction exercise First Amendment rights in Times Square by exhibiting sex-oriented 8 mm. films or tapes in peep machines.[2] These 8 mm. films have a running time of approximately 45-55 seconds for 25 cents. The UDC documents (as well as the buying public) clearly differentiate between adult stores with 8 mm. film exhibition and adult movie houses, topless bars, swingers clubs and dance halls.

The UDC August 1984 Final Environmental Impact Statement (FEIS) details why adult retail stores and adult movie houses (collectively called adult uses) allegedly contribute to blight and therefore have to be permanently replaced by "legitimate" tenants to eliminate blight. However, the documents and the lower Court's unchallenged fact finding both show that the adult uses do not contribute to blight. Nonetheless, only speech uses are permanently excluded for blight they do not cause.

The lower Court also found as fact that there was an official policy of hostility to adult uses. (App-37).

Unlike *Young*, this Project will result in an immediate 65% to 70% reduction of adult store 8 mm. film exhibition in the entire City. The City's Zoning Resolution reinterpretation prohibits their relocation except in an amusement park, such as Coney Island. Hence, the denial of public access is virtually complete.

---

[2] Both the 8 mm. films and tapes shall hereafter be referred to as 8 mm. films. They both utilize peep machines for exhibition at a cost of 25 cents.

The Circuit Court held it was immaterial that adult uses did not contribute to blight. It (a) relied on *Young* but ignored its predicate fact justification that adult theater concentration causes blight and (b) then held speech destruction in this case was governed by due process and not the First Amendment (App-18).[3]

The Second Circuit then held that the "subjective motivation" of some Project proponents to suppress speech was immaterial because there was supposedly substantial justification for the Project independent of such motive and that "illicit legislative motive" was irrelevant. (App-19).

The Court further held that there was no significant deterrent effect resulting from the elimination of 65-70% of adult 8 mm. film exhibition because the public has access to books and magazines, to swingers clubs and dance halls (which do not engage in speech presentation), to topless bars, which do not exhibit 8 mm. films, and to movie theaters, which exhibit 16 or 35 mm. films for over an hour at a cost of $5 to $6. (App-21-23).

In major part, the Second Circuit relies on *Young* and *United States v. O'Brien*, 391 U.S. 367 (1968) but does not even make passing reference to *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981).

Facts

The Project had its formal origin in a 1980 City of New York/UDC Memorandum of Understanding to use condemnation to eliminate "street crime, substandard *** conditions, ***undesirable uses*** and physical and social blight *** ." (See App-4, emphasis supplied). In 1981 the City and UDC released various documents including a discussion document, May 1981 Design

---

[3] The page numbers of the opinions reproduced in this petition are designated by the prefix "App" followed by the petition appendix page number.

Guidelines and Request for Proposals from private developers. All of these documents were marked as exhibits and petitioner's moving papers quote extensively from the pertinent provisions thereof.

These 1981 documents specify in great detail what the private developers must build, i.e. new office buildings, and the uses of the premises. They mandate "quality" retail and entertainment uses and list the permitted retail stores. (A-24-27).* Although petitioner and others similarly situated operate retail stores and furnish entertainment they are specifically excluded.

In 1981 the UDC also issued the "Basis for Blight Finding and Statutory Findings." (App-4, A-28-30). These 1981 documents show conclusively that adult uses do not in any way contribute to street crime, physical deterioration or any blight. A careful study of the subseqent August 1984 FEIS confirms this and it is the uncontradicted finding of the District Court. (A-51-61; App-45-46).

In 1983 the City of New York Office of Midtown Enforcement (OME) issued a 130-page 1982 Annual Report, also marked as an exhibit and quoted from extensively in petitioner's moving papers. It states that OME is a City agency organized in 1976 inter alia to "prosecute **** obscenity" and improve Times Square by eliminating adult uses. It proudly announces its participation in and the Project's success in replacing adult stores with "legitimate tenants" and "positive," "good" and "desirable" uses. (A-33-41).

In February 1984 the UDC released its Draft Environmental Impact Statement (DEIS). It proclaims that OME is prepared

---

* For clarity, a list of all documents submitted as exhibits by petitioner and respondents is set forth in App. E, F and G. Generally, they are referred to by their official designation or abbreviation. A capital "A" is used as the prefix to designate the joint appendix page numbers as filed with the Second Circuit. As stated, the opinion page numbers are designated by the prefix "App".

to mitigate the adverse impact of adult stores' possible relocation by establishing a "clearing house service to encourage landlords to fill vacate space with non-sex-related tenants" (A-200-201).

In public hearings of March 1984, Governor Cuomo and UDC pronouncements urged adoption of the Project to eliminate pornography. The literature states that the Project will make Times Square inviting by "replacing sex-related businesses *** (with) legitimate retail outlets" (A-43-44; 3/26/84 Public Hearing pp. 8-9, Pet.'s Ex. J and K).

The lower court took note of some of the foregoing and other pronouncements, emphasizing that they present "just a *brief* sampling of the negative statements about adult uses with which the FEIS and other Project documents are rife." The District Court also found that the Project documents "show that the government [respondents] have an official policy of hostility towards adult uses." (App-37, emphasis supplied).

Aside from official hostility, the FEIS clearly identifies with great specificity the governmental interests which require that adult uses must be replaced with desirable uses to achieve the goal of blight elimination.

The FEIS proclaims that the supposed physical decay is no more than a "back-drop" for the real problem of blight defined as street crime, drug dealing and loitering. The FEIS then describes in great detail the special uses and the ways in which they supposedly contribute to the blight. These special uses include adult retail stores, adult movie theaters, Brandt's action film movie theaters, as well as fast food restaurants, liquor stores and bar outlets (FEIS pp. 2-56 to 2-91).

The FEIS then gives the solution for blight rehabilitation, to wit, that the special uses must be replaced by more stable and traditional retail uses. For example, the FEIS states:

> "The continuation of the existing uses in the project area – and, more importantly, the *continued absence of more stable uses* such as office buildings and *traditional retail*- will undoubtedly *perpetuate* the *loitering* and *criminal activity* on 42nd Street." (FEIS p. 2-94, emphasis supplied).

The FEIS continues with the solution:

"When completed the project will eliminate or alter nearly all of the special uses in the project area. *Specifically, there will be no action or pornographic movies, sex-related establishments*, or pinball arcades. *** The new development will *contain* some *fast food* places and, certainly, *restaurants* selling *beer or liquor*, but these establishments will play an important role in supporting a new mix of uses ***" (FEIS p. 2-95; emphasis supplied).

While the FEIS asserts that adult uses contribute to blight (and hence must be replaced by stable, desirable uses) a careful analysis shows that adult uses do not in any way do so. (A-51-61). The District Court agreed and found as fact that "the actual connection between adult uses and crime, decay, and drug use is demonstrated tenuously if at all." (App-46).

Nonetheless, and despite the FEIS finding that fast food restaurants and liquor stores contribute to blight, the FEIS specifically mandates that (1) fast food restaurants and liquor stores be permitted in the project area but that (2) adult uses which do not (as the lower court found) contribute to the blight must be permanently excluded and replaced with so-called "legitimate" stores (FEIS pp. 2-94, 2-95).

For at least 10 years the City has engaged in endless harassment tactics designed to destroy adult stores by the use of licensing laws, building codes, illegal seizures, etc., catalogued in petitioner's moving papers. (A-34-37; A-197-200). The lower court found that this litigation history "bolstered" its conclusion that there was a policy of official hostility toward adult uses. (App-37).

Among these many legal devices used to banish adult stores was a 1975 City reinterpretation of its zoning ordinance which continues to this day. The City claims that where an adult store has more than 4 machines, it is an amusement arcade and hence can be located only in an area zoned as an amusement park, i.e. Coney Island. (A-195-200).[5] At the present time no store with more than 4 peep machines is permitted to operate in any new premise.

Contrary to the Circuit Court statement (App-23), the City makes it plain that this restriction stems not from the presence of a coin mechanism, but from the array of machines exhibiting 8 mm. films or video tapes which supposedly converts a store into an amusement park.[6] Hence, not only is there a 65% to 70% present elimination of 8 mm. film exhibition, but relocation is impossible.

Adult stores with peep machines exhibiting 8 mm. films for a brief running time at very low cost exist only because of public demand. The FEIS in several places, including Figure 2-15 upon which the Circuit Court relies, describes in detail the various different types of sex-related use establishments. The FEIS specifically identifies adult store 8 mm. peep machine exhibition as a well-defined separate use. The FEIS specifically differentiates between

---

[5] Adult stores also use Peep-A-Live machines for the exhibition of live performances which are treated by the City as subject to the same four machine limit. For convenience, they are collectively referred to as peep machines.

The only reason why adult stores with more than 4 peep machines are still operating at their present location is because the Supreme Court, New York County denied the City's motion for preliminary injunction. *City of New York v. Rambling Ram Realty*, S.Ct. N.Y.Co., Index No. 43556 (1981).

[6] The Circuit Court says adult stores have available other means of exhibition "including use of machines that are not coin-operated" (App-23). That is completely wrong.

The Building Commissioner's October 1975 memorandum proclaimed that where premises have more than 3 peep machines (changed in 1981 to 4) such premises "shall be considered as amusement establishments." The word coin is not used (A-208-209).

adult store 8 mm. film exhibition and swingers clubs, dance halls, topless bars and movie houses. Despite this the Circuit Court held that from the viewpoint of diminution of public access they are all alike.

REASONS FOR GRANTING WRIT

I. The Governmental Interest In Eliminating Blight By Ordering That Legitimate Stores Replace Adult Uses Which Do Not Cause Blight May Not Be Justified On Due Process Grounds

Elementarily, the state must demonstrate a substantial governmental interest supported by a factual basis where a land control program significantly impacts on the First Amendment. *Young*, 427 U.S. at 55, 71 and n.34; Id. at 76, 79-81 (Powell, J.); *Schad*, 452 U.S. at 67, 70-72; *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 at 661 (CA 8 1981, en banc).

As a corollary, as Mr. Justice Powell states, there must be "a careful inquiry into the competing concerns of the State" and First Amendment interests. (427 U.S. at 76). *Schad* held that the Court "must scrutinize * * * the interests advanced" by the City to justify a speech limitation (452 U.S. at 71).

What is the governmental interest advanced in this case? The FEIS proclaims, in detail, that adult uses supposedly contribute to decay, that their continued presence will cause blight and hence must be replaced by desirable uses. However, as stated, the documents show and the District Court found that adult uses do not contribute to decay (App-45-46). This finding was not contradicted by the Circuit Court.

Instead, the Circuit Court held this immaterial. It first quotes extensively from the *Young* plurality holding, 427 U.S. at 71-72, that it is not the Court's function "to appraise the wisdom of [the City's] decision" authorizing adult locational restrictions which "must be accorded high respect." (App-18).

The Second Circuit however, completely ignores Mr. Justice Steven's statement and footnote which shows the predicate basis for the foregoing. *Young* agreed with the District Court judges

that "[T]he record discloses a *factual basis*" for Detroit's determination that "a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime" (427 U.S. at 71 and n. 34, emphasis supplied). Indeed, the very outset of the *Young* plurality opinion emphasizes that the Detroit zoning program was based upon the specific opinion of urban planners that the concentration of adult theaters causes crime increase and blight. (427 U.S. at 55).

Having completely disregarded the *Young* factual basis for Detroit's substantial interest, the Second Circuit then adopts the *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, ____ U.S. ____, 81 L.Ed.2d 186 (1984) police power due process rationally related test. It holds that if an area is blighted, the State may condemn the unblighted parcels and that "legislature's land use decisions [are accorded] wide deference." (App-18).

Schad specifically rejected the *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (and with it *Berman v. Parker*, upon which it relies) and the *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) due process rationally-related test. *Schad* specifically held that "as is true of other ordinances, when a zoning law infringes upon a protected liberty" it must further a substantial governmental interest and is judged under the First Amendment, not due process. (452 U.S. at 68, 71). That principle applies to condemnation.

Schad, and every circuit following *Schad*, have uniformly invalidated adult zoning on First Amendment grounds where as here the courts conclude that adult uses do not contribute to blight. *Schad*, 452 U.S. at 72-74; *Avalon*, 667 F.2d at 661; *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 98 (CA 6 1981), and *Basiardanes v. City of Galveston*, 682 F.2d at 1203, 1215 (CA 5 1982). This case is not controlled by due process.

Since to our knowledge there has never been a condemnation First Amendment case before this Court we stress the following. Petitioner never did and does not now claim that every First

Amendment activity automatically bars the exercise of eminent domain power. Obviously there can be condemnation removal of speech entities where the government's reasons for condemnation do not purport to involve First Amendment uses and no governmental claim is made that speech entities contribute to blight.

However, that is not this case. Pages and pages of the FEIS describe in detail the supposed contribution of adult uses to crime and decay which mandate their permanent replacement by so-called desirable uses as a necessary condition of eliminating blight. That is the stated government justification for replacing only speech uses.

Nonetheless, as noted, the documents show and the lower court found that adult uses do not contribute to blight. The Court is not entitled to disregard what the government says is its substantial interest in eliminating First Amendment activity, rely on Due Process and read the First Amendment out of this case.

II. The Project Embodies Official Hostility To Adult Uses And Mandates Desirable Tenants Replace Only Speech Entities For Blight They Do Not Cause. The Project Is Not Unrelated To Suppression Of Speech, Is Violative Of The First Amendment And Equal Protection Clause, And Motive May Not Be Disregarded

O'Brien-Young requires that the government speech control advance a "substantial governmental interest *** unrelated to the suppression of free expression." (427 U.S. at 79-80). Further, if invidious discrimination aimed at the First Amendment is one of the motivating factors, it is immaterial that the other legitimate state concerns predominate. See: *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 at 265-266 (1977).

The Second Circuit held that the Project is content neutral. Applying *O'Brien-Young*, it also held that a "subjective motivation on the part of some proponents of the Project to suppress

sex-related businesses does not render it unconstitutional, ... [that illicit legislative motive is irrelevant and that] important governmental interests unrelated to suppression of speech exist, independent of any desire to suppress speech." (App-19).

According to the Second Circuit the substantial governmental interests consist of the elimination of physical decay and social blight. However, the FEIS specifically mandates the permanent replacement of only speech uses[7], including adult stores, with legitimate stores as necessary to accomplish this substantial interest objective. The elimination of speech cannot be unrelated to the purpose of eradicating blight when the FEIS says it must replace speech uses to eliminate blight.

In addition, the Circuit Court does not question the lower court finding that the Project documents show a governmental "official policy of hostility" to adult uses (App-11, App-37). This is not a subjective motivation of some governmental respondents, it is official policy.

The Circuit Court stresses the worthwhile goals of new office buildings and the elimination of street crime. However, the FEIS states this cannot be achieved without the permanent replacement of only "undesirable" speech uses by legitimate tenants. Further, where this is accompanied by official hostility to speech the Project is not unrelated to speech suppression. Even assuming the worthwhile goals predominate, there still is an impermissible motive. *Village of Arlington Heights*, 429 U.S. at 265-266.

Since *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527 at 537 (CA 9 1984), *jur. noted*, 85 L.Ed.2d 297, *City of Renton v. Playtime Theaters, Inc.*, No. 84-1360, argued November 12, 1985,

---

[7] The only exceptions are two pinball arcades which are also permanently replaced.

In answer to petitioner's preliminary injunction motion papers the City and UDC, obviously recognizing the complete illegality of excluding adult uses, filed answering papers saying they had no intention five years from now of discriminating against adult uses. These litigation affidavits cannot alter the Project as written and approved.

relied on *Arlington Heights* for its mixed motive holding, this word is in order. The City of Renton's jurisdictional statement makes it very plain that there "was no evidence that any member of the City Council had any improper motive." Instead there were opinions by private citizens which were imputed to the City Council (*City of Renton* Jur. Statement p. 22). That is not this case. There is a major difference between hostility of private citizens toward adult theaters and official hostility.

The Circuit Court relied on *O'Brien*, 391 U.S. at 383, and *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 at 829 (CA 4 1979) to hold legislative motive is irrelevant (App-19).

Petitioner makes no claim about legislative motive in the enactment of the UDC Act, does not attack the facial validity thereof but only its application by City and State officials. Passing that distinction, the Circuit Court's holding is completely at odds with the last portion of Mr. Justice Powell's footnote 4 dealing with intent and purpose (427 U.S. at 81, n. 4), as well as with *Avalon Cinema*, 667 F.2d at 662-663. See also: *Bayou Landing, Ltd. v. Watts*, 563 F.2d 1172 at 1175 (CA 5 1977).

If government officers' "subjective motivation" to destroy speech and official hostility to the First Amendment is irrelevant, then Mr. Justice Powell's footnote 4 makes absolutely no sense. See also: *City Council v. Taxpayers for Vincent*, ____ U.S. ____, 80 L.Ed.2d 772 at 786 (1984). If for no other reason, the petition should be granted to clarify this ubiquitous question of motive.[8]

Finally, this Project is not content neutral. The Circuit Court emphasizes that in addition to adult uses, some 400 other businesses are being removed. However, the FEIS does not mandate that these 400 other entities must be replaced by positive

---

[8] *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (Sec. 1983 damage action-no proof of intent necessary, person responsible for the natural consequences of his actions); *Parratt v. Taylor*, 451 U.S. 527 at 534-535 (1981) (Section 1983 action has no state of mind requirement); *NAACP v. Alabama*, 357 U.S. 449 at 461 (1958) (prior restraint even no direct government action and "even though unintended").

uses in order to solve the decay problem. While fast food restaurants and liquor stores are among those special uses that contribute to blight, it is only the speech uses which do not contribute thereto that must be permanently replaced in order to achieve rehabilitation. (FEIS pp. 2-94, 2-95).

There is no official hostility to the other businesses being removed, or a government policy of discouraging landlords from renting to those entities, or governmental expressions of dislike about the products and window displays of those other entities, or a detailed statement of the names, addresses and hours of operation of those other businesses. There is no government prohibition on the relocation of those other entities. Official hostility is directed only against adult uses. The Project is not content neutral. See: *Police Department v. Mosley*, 408 U.S. 92 at 96, 99 (1972); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 at 209 (1975); compare: *City Council v. Taxpayers for Vincent*, ____ U.S. ____, 80 L.Ed.2d at 786.

III. There is an Unconstitutional Diminution of Public Access

We turn from motive to effect. Where a land control program has a significant deterrent effect on "adult" speech, it must fail. *Young*, 427 U.S. at 71-72, n. 35, 79 (no "significant overall curtailment *** the number of adult movie theaters in Detroit will remain approximately the same". *Id.* at 79); *Schad*, 452 U.S. at 76 ("greatly restricting").

As stated, MJM and virtually all adult stores exhibit 8 mm. films or tapes in peep machines. The Project will result in: (1) a 79% reduction of public access to all adult retail 8 mm. film exhibition within a 3 block radius; (2) and at least a 65% to 70% immediate reduction in all Manhattan and the entire City.[9] Furthermore, the City's zoning reinterpretation makes their

---

[9] These statistics are based on the FEIS including Figure 2-15. Using 1983 data the FEIS shows that after Project completion there will be exactly 4 adult stores exhibiting 8 mm. films within a 3 block radius, and 9 stores (now only 7), in all of midtown Manhattan. (FEIS pp. 2-57 to 2-59 and Figure 2-15; A-163).

relocation impossible (except in Coney Island) so that the reduction is permanent.

The Circuit Court using the same UDC data as petitioner states that after Project completion there will be "48 sex-related uses" remaining, and hence there is no substantial diminution of public access. This mystifying conclusion is based upon its holding that adult store exhibition of 8 mm. films can be equated with topless bars (which do not exhibit films), swingers clubs and dance halls (which do not engage in any speech presentation), movie theaters, which exhibit 16 or 35 mm. full-length motion pictures with a running time of over an hour at a cost of $5 to $6 for admission, and "exhibition *** [by] books, magazines ***." (App-21-23).

The Circuit Court pronounces that petitioner was engaged in use-fragmentization, which it says is not constitutionally mandated, and that the burden on speech diminution need not be "judged by the most adversely affected specific use, as distinguished from other closely related uses." (App-22). In short, if the subject is sex, then all forms of activity, even those which do not involve speech presentation, are supposedly "closely related" and all differences are immaterial.

Mr. Justice Powell's decision in *Young* states that the "primary concern of the free speech guarantee is that there be full opportunity for expression in all of its varied forms" (427 U.S. at 76). Every adult zoning case in the country has recognized the differences between different types of adult uses. See, e.g., *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D.Ga. 1981). The FEIS clearly distinguishes the different types of adult uses and *unequivocally* differentiates movie theaters from stores with peep machines. (FEIS pp. 2-57 to 2-59).

Schad, 452 U.S. at 76-77, quoting *Schneider v. State*, 308 U.S. 147 at 163 (1939), held: "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Acc'd: *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 at 556 (1975).

Concededly, this *Schad* holding deals with the place of expression by the exhibitor. However, the principle is directly applicable to the medium of expression especially because it affects the rights of the public. See: *Schad*, 452 U.S. at 78, Blackmun J. See also: *Quantity of Books v. Kansas*, 378 U.S. 205 at 213 (1964) (right of the public to unobstructed circulation).

There is no justification for directing that the public must give up its right to view very short low-cost 8 mm. films in peep machines because it has access to swingers clubs, dance halls, topless bars or full length movies for a substantially higher cost.

In this case there is a significant retroactive destruction of adult 8 mm. film exhibition and an inability to relocate. *Young* operated prospectively. It permitted future locational restrictions only because there was no "significant deterrent effect on the exhibition of films ***" and as the District Court found the Detroit ordinances "*** *do not affect the operation of existing establishments* but only the location of new ones." (427 U.S. at 60, 71-72, n. 35, emphasis supplied).

Post-*Young*, virtually every federal court has concluded that an adult zoning ordinance may not be retroactively applied to destroy First Amendment rights or has upheld adult zoning only because of a grandfather clause.[10]

---

[10] *Avalon Cinema Corp.*, 667 F.2d at 662 ("significant difference" from Detroit, ordinance impacted on present use); *Alexander v. City of Minneapolis*, 698 F.2d 936 at 938, 939 and n. 6 (CA 8 1983) (retroactive question not reached but noted access restriction increase because zoning existing uses); *Bayou Landing Ltd.*, 563 F.2d at 1175 (retroactive application invalid); *Genusa v. City of Peoria*, 619 F.2d 1203 at 1211-1212 and n. 18 (CA 7 1980) (plaintiffs lacked standing—under grandfater clause present uses not affected); *Ellwest Stereo Theatres Incorporated of Texas v. Byrd*, 472 F.Supp. 702 at 706 (N.D.Tex. 1979) (invalid, inter alia, prevented present use); *Purple Onion, Inc.*, 511 F.Supp. at 1210-1211, 1214 (City and Court both recognized adult zoning could not close down existing uses); Contra, *Hart Book Stores, Inc.*, 612 F.2d at 830 (relying on the due process rationally related test).

The Second Circuit just disregarded all of the foregoing authorities.[11] Instead the Court repeated its astonishing theme that dance halls, etc., movie theaters with 16 to 35 mm. film exhibition, and "exhibition" by books and magazines are all comparable to retail store 8 mm. peep machine exhibition (App-21-23).

The Court held that "the Constitution does not entitle a person to distribution of information in precisely the same form as ***the least expensive means of expression, as long as a comparable method is available. *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F.2d 767, 774 (2nd Cir. 1984); see also *Heffron v. International Society For Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981)." (App-23).

This cries out for clarification. *Gannett* involved the choice of either paying a license fee to the MTA for newsstands in commuter stations (to help defray MTA costs) or distributing newspapers on "newsracks on streets or sidewalks near the stations." (745 F.2d at 774). This was a reasonable time, place and manner restriction.

Gannett did not remotely suggest that the public's right to buy a newspaper could be satisfied by viewing a movie or purchasing a book. *Heffron* does not even intimate that listening to a radio church sermon is the equivalent of the right to read religious literature.

There is substantial diminution of public access to 8 mm. film exhibition. It may not be justified on the specious theory that visiting a swingers club, dance hall or topless bar, or viewing a one hour movie at a cost of $5 to $6, or buying a book or magazine, are all equivalent to viewing an 8 mm. film for twenty five cents. For this additional reason the petition should be granted.

---

[11] *Schad* shows the challenged ordinance was in existence before the bookstore introduced the element of a coin-operated device ("Peep-A-Live") to view nude dancing. (*Id.* at 62-64 and n. 3 and con.op. of Mr. Justice Stevens at 82). Hence *Schad* involved prospective application not retroactive destruction.

IV. The Intentional Failure to Use the Less Drastic Means of Police Sweeps Further Invalidates The Project

The Circuit Court does not disagree that the government must use the least drastic means. However, it states that no evidence "was proferred" that police sweeps would be an effective means of eliminating street crime (App-21). The record shows otherwise.

Petitioner's moving papers charged in detail that the less intrusive measure of police sweeps had been effectively used by the City to clean up crime and drug dealing in areas *outside* the Project, to wit, by "Operation Weekend" in the Times Square Theatre district and "Operation Pressure Point" in Manhattan's Lower East Side (A-62-65). This was not denied.

The lower court somehow mistranslated the petitioner's claim into one that police sweeps "have been successful in curtailing street crime *in* the Project area." (App-48, emphasis added). As a result, the lower court ruled that this was not a viable least intrusive measure because the police sweeps in the area "have not had the permanent effect of really 'cleaning up' the street." (App-48). However, what the petitioner actually alleged was that the City deliberately did not use the proven successful measure of police sweeps in the Project area in order to justify condemnation. There is no basis for rejecting this First Amendment claim on a misreading of the record.[12]

---

[12] In addition, the FEIS recites the recent vast improvements in the immediate vicinity of the Project area (A-65; FEIS pp. 2-35 to 2-40). The Court can take judicial notice of New York's booming real estate market. If police sweeps had been used, the area would continue to improve. *Bose Corp. v. Consumers Union of United States, Inc.*, ___ U.S. ___, 80 L.Ed.2d 502, 104 S.Ct. 1949 (1984), mandates *de novo* review in this First Amendment case.

V. Most Circuits Hold That Presentation of Matters Outside the Pleadings Does Not Permit Sua Sponte Conversion of a 12(b)(6) Motion Into Summary Judgment Motion. This Conflict and Important Recurring Problem Should Be Addressed

The Circuit Court correctly states that Rule 12(b)(6) permits the District Court to consider matters outside the pleadings and to convert a dismissal motion into summary judgment provided "all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56." The Court then observes that Rule 56(c) requires that the motion for summary judgment "shall be served at least 10 days before the time" fixed for the summary judgment hearing.

It held however, that these rules are governed by "principles of substance" and the "essential inquiry is whether the [petitioner] should reasonably have recognized the possibility" of summary judgment or was taken by surprise. (App-13).

This rule redrafting is in conflict with the Second Circuit decision of *In re Bristol Industries Corp.*, 690 F.2d 26 (CA 2 1982), quoted in petitioner's brief, but ignored by the court below. In *Bristol* there was a preliminary injunction motion, two hearings on that motion and a motion to dismiss. The conversion of the 12(b)(6) motion into summary judgment was reversed. *Bristol* held that such conversion "would effectively abrogate the notice provisions of Rule 56" and would require a party to present all of his evidence at the outset, placing an undue burden on one seeking preliminary injunctive relief. (690 F.2d at 29).[13]

Bristol's holding is particularly pertinent where the additional evidence is in the possession of the defendants and must be uncovered by deposition. See Rule 56(f).

Aside from the conflict within the Second Circuit, we note that almost all circuits require strict compliance with the rules and

---

[13] *Bristol Industries* also rejected *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (CA 6 1975), upon which the panel below relied. Compare *Bristol*, 690 F.2d at 29, with *G&A v. Stern* at App-14.

hold 12(b)(6) "reasonable opportunity" mandates some warning and a Rule 56 motion. These decisions rejecting the Second Circuit approach are collated in the footnote.[14]

Form should not be exalted over substance. However, it is hardly an undue burden for a district court to give some notice of possible conversion even if it believes that there are no genuine issues.

We turn to what the Circuit Court calls substance to illuminate why Rule 12(b)(6) and 56 should not be rewritten by decisional law. As noted, the Court below held that there was supposedly no evidence proferred that police sweeps would be effective. (App-21).

Factually, that is completely wrong. As stated, the moving papers demonstrated without contradiction that police sweeps were effectively used outside the Project area (A-62-65). The fact issue is whether or not the City deliberately refrained from using police sweeps in the Project area in order to set the stage for a claim that condemnation was necessary.

That fact is within the knowledge of respondents. See Rule 56(f). Obviously, this could not be proven without discovery. In addition, assuming this was necessary for injunctive relief, petitioner

---

[14] *Bryson v. Brand Insulations, Inc.*, 621 F.2d 556 (CA 3 1980) (Matters outside of the pleadings considered; no summary judgment without specific Rule 56 notice); *Gay v. Wall*, 761 F.2d 175 at 177 (CA 4 1985) (Affidavits, 12(b)(6) "reasonable opportunity requires *** some indication by the Court" it was treating 12(b)(6) as summary judgment); *Capital Films Corp. v. Charles Fries Productions, Inc.*, 628 F.2d 387 (CA 5 1980) (preliminary injunction, sua sponte conversion without notice rejected; divergent circuit court views set forth); *Macklin v. Butler*, 553 F.2d 525 at 529 (CA 7 1977) (Motion to dismiss and affidavit, "12(b)(6) reasonable opportunity" requires some indication by the Court that it is treating 12(b)(6) motion as summary judgment); *Dolese v. United States*, 541 F.2d 853 (CA 10 1976) (Defendant's motion for summary judgment, pretrial conferences held; grant of summary judgment reversed for non-compliance with Rule 56); *Milburn v. United States*, 734 F.2d 762 at 764, 766 (CA 11 1984) (Defendant's motion to dismiss or for summary judgment, and affidavits filed; summary judgment reversed; Rule 56 requires strict complaince and ten days advance notice).

was not allowed by discovery to uncover further statements to show motive was not just a "subjective" matter. If petitioner had been given some warning it could have sought discovery in an effort to present such evidence to the District Court. Instead, and as the Circuit Court noted, petitioner requested further time to submit additional papers. (App-15). However, the record clearly shows that this request was limited to the "4 machine limit" issue and the additional papers were addressed almost exclusively to relocation. (A-269).[15] They were not submitted in an attempt to place all factual issues of the case before the Court because petitioner had no notice of possible summary judgment.

Sua sponte conversion without warning and without Rule 56 motion is not authorized. In the light of divergent views of the circuits, this recurring problem should be resolved by this Court.

---

[15] On December 12, 1984, the day of oral argument, respondents served papers claiming that amusement arcades could be located in residential neighborhoods if special one-year City permits were obtained. Therefore, the respondents asserted that there were relocation possibilities. Our additional papers were addressed almost exclusively to that point. We demonstrated that aside from the unconstitutionality of the licensing standards, the notion that the City would permit the exhibition of adult 8 mm. films in a residential neighborhood with children was preposterous. (A-270 to A-273).

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.

Respectfully Submitted,

RALPH J. SCHWARZ, JR.
Attorney for Petitioner
122 East 42nd Street
Suite 2117
New York, New York 10168
(212) 867-8850

Of Counsel:
RALPH J. SCHWARZ, JR.
KEITH N. COSTA
STEWART STONE

DATED: New York, New York
December 11, 1985

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1287 — August Term, 1984

(Argued: May 22, 1985 Decided: August 8, 1985)

Docket No. 85-7190

G.&A. BOOKS, INC., 250 BOOK CENTER, INC., COURAGEOUS BOOKS, INC., and M.J.M. EXHIBITORS, INC.,

Plaintiffs,

M.J.M. EXHIBITORS, INC.,

Plaintiff-Appellant,

—against—

WILLIAM J. STERN, individually and as Chairman of the New York State Urban Development Corporation, WILLIAM H. DALY, individually and as Director of the Office of Midtown Enforcement of the City of New York, STEVEN SPINOLA, individually and as President of the Public Development Corporation of the City of New York, HERBERT J. STURZ, individually and as Chairman of the City Planning Commission of the City of New York, EDWARD I. KOCH, individually and as Mayor of the City of New York, THE CITY OF NEW YORK, PARK TOWER REALTY CORP,. PLANNING INNOVATIONS, INC., TISHMAN SPEYER PROPERTIES and EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendants-Appellees.

Before:

MANSFIELD, VAN GRAAFEILAND and PIERCE,
Circuit Judges.

Appeal from an order of the Southern District of New York, Constance B. Motley, *Chief Judge*, denying plaintiffs' motion for a preliminary injunction to stop condemnation of buildings on 42nd Street in which plaintiffs operate adult sexually-oriented businesses and granting summary judgment dismissing the action.

Affirmed.

RALPH J. SCHWARZ, JR., Esq., New York, NY (Keith N. Costa, on the brief), *for Appellant.*

MARTIN FLUMENBAUM, Esq., New York, NY (Jay Cohen, Esq., Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY, of counsel), *for Appellees Tishman Speyer Properties and Equitable Life Assurance Society of the United States.*

JUNE A. WITTERSCHEIN, Esq., New York, NY (Frederick A.O. Schwarz, Jr., Corporation Counsel of the City of New York, Jeffrey E. Glen, Esq., Leonard Koerner, Esq., Robert J. Pfeffer, Esq., Gary Schuller, Esq., of counsel), *for Municipal Appellees.*

SHEA & GOULD, New York, NY (Bernard D. Fischman, Esq., Dean G. Yuzek, Esq., Judith L. Spanier, Esq., of counsel), *for Appellee Park Tower Realty Corp.*

LEAHEY & JOHNSON, P.C., New York, NY (Peter James Johnson, Esq., Asher Marcus, Esq., Kevin B. Lynch, Esq., Michael Conforti, Esq., of counsel), *for Appellee William J. Stern.*

DEVOV MORRIS & HAMMERLING, New York, NY (Robert C. Hammerling, Esq., Marshall H. Fishman, Esq., of counsel), *for Appellee Planning Innovations, Inc.*

MANSFIELD, *Circuit Judge*:

M.J.M. Exhibitors, Inc. ("MJM"), which operates an adult retail store on 42nd Street, using peep machines for the exhibition of sexually-oriented films, selling tapes, and furnishing live performances, appeals from an order and judgment of the Southern District of New York, Constance Baker Motley, *Chief Judge*. The order denied appellant's motion for a preliminary injunction against various municipal, state, and corporate defendants' proceeding with the New York State Urban Development Corporation's ("UDC") Times Square Rehabilitation Project (the "Project") and granted summary judgment dismissing the action. The complaint, filed by MJM and three other plaintiffs operating adult retail stores on 42nd Street, alleges that defendants' actions in furtherance of the Project, including destruction of buildings in which plaintiffs currently operate their businesses, would violate plaintiffs' rights under the First and Fourteenth Amendments. Finding that the proposed condemnation of plaintiffs' property did not constitute an illegal prior restraint and that the Project plan did not classify speech on the basis of content, or burden it with overly restrictive regulations, the district court granted summary judgment to defendants. We affirm.

This case arises from the efforts of the City of New York (the "City") and the UDC to implement a comprehensive plan for the elimination of blight and the rehabilitation of the 42nd Street/Times Square area of Manhattan, New York City. Under the New York State Urban Development Corporation Act, New York Unconsolidated Laws, §§ 6251, *et seq.* (McKinney 1979), the Legislature vested the UDC with broad powers to enter into contracts and acquire property for the reconstruction, improvement and rehabilitation, in cooperation with private enterprise, of slum or blighted areas for the purpose of eliminating crime and delinquency, improving the physical, educational and economic development of such areas, and increasing employment and business opportunities therein.

In June 1980 the City and the UDC entered into a formal "Memorandum of Understanding," in which they agreed to cooperate to improve and redevelop the 42nd Street area, in order to ameliorate the "street crime, substandard and [unsanitary] conditions, undesirable uses and physical and social blight which have impaired the sound growth and development of the Project Area and of the City as a whole." By June 1981 these two parties had issued the "42nd Street Development Project: A Discussion Document" and design guidelines for the Project, and had made a formal request for proposals from private developers for the construction of new buildings to be used as retail stores, theatres, and for other purposes. The "Project Area" consists of a 3-block section between 40th and 42nd Streets, bounded by Broadway and Eighth Avenue. The UDC Board of Directors also issued two documents, "Basis for Blight Finding" and "Statutory Findings of Substandard Area," setting forth the factual findings required by the UDC Act. Having in September

1981 received and reviewed the proposals made by private developers, conditional designations of developers to construct and maintain the proposed office buildings, merchandise mart, hotel and theatres for the project were made. An environmental impact statement was submitted pursuant to the New York State Environmental Quality Review Act ("SEQRA"), New York Environmental Conservation Law, §§ 8-0101, *et seq.* (McKinney 1984), and public hearings were held by the UDC pursuant to the UDC Act, SEQRA, New York's Eminent Domain Procedure Law and the New York Historic Preservation Act. In November 1982 the UDC formed the Times Square Redevelopment Corporation ("TSRC") and entrusted it with primary responsibility for the development of the Times Square area.

The primary document setting forth the factual basis for the Project is the Final Environment Impact Statement ("FEIS"), issued in August 1984 after several public meetings responding to an earlier Draft Environmental Impact Statement. The FEIS graphically depicts the social blight in the Project Area:

> "In addition to the uses on the blocks that are distasteful to many [including eight theatres showing action, horror, and brutality films and four showing pornographic films, 15 sex businesses (all prominently displaying sexually explicit material), bar outlets, window displays of knives and blackjacks, bars, fast food restaurants, and arcades], visitors often find the collection of hustlers and loiterers threatening. At virtually any hour, at least a few people will be found 'hanging out' along the sidewalks; and in the afternoons and evenings, the ranks can swell dramatically and number in the hundreds. The drug

dealers and their customers, public drinkers, homeless persons, young people simply standing around, gathered as they often are in groups blocking the sidewalks and aggressively soliciting business, have an impact far beyond their absolute numbers. Forty-second Street is their territory, and those passing through it often perceive that they do so at their own risk.

"The reality of the risk is borne out by crime statistics for the area. Forty-second Street between Seventh and Eighth Avenues has consistently been among the most crime ridden in the City. Despite increased police deployment, reported crime in the area increased by 53 percent from 1978 to 1980 and since that time has remained consistently high. Below ground, the Times Square and Eighth Avenue subway stations serving the project area have regularly ranked number one and two in reported felony and misdemeanor complaints. It is hardly surprising that the police regard 42nd Street as a 'breeding ground' for crime, especially among the young."

The FEIS treats the severe underuse of the land in the Project Area's 13 acres as further evidence of blight. Only 4,000 people, an extraordinarily low figure for a five-block area located adjacent to one of the world's most densely developed business districts, work in the area. As a result of an absence of development for more than half a century, the existing buildings are old and run down; most are substandard for their intended commercial uses and many are vacant above the first floor. While the area is zoned for the highest density allowed in the City, 16% of the land area is used only for parking, 72% of the development rights have not been used.

and 18% of the developed parts is vacant. The tax yield from the Project area is commensurately low: the FEIS estimated that while the existing properties in the Project area were expected to pay approximately $5.4 million in taxes in 1984-85, a single building a block away was expected to pay $6.3 million in taxes.

To overcome these conditions, the FEIS defined the following project goals:

> "First, to eliminate the blight and physical decay, as well as the crime and frightening street life, that now characterizes the West 42nd Street area;
>
> Second, to preserve and restore the area's extraordinary older theaters for theatrical and upgraded movie use, and, by so doing, to revitalize the project area as a theater and entertainment center serving tourists and all New Yorkers;
>
> Third, to develop the project area's commercial and retail potential to produce a lively, healthy street ambience and to support the City's policy (as expressed in the new Midtown Zoning) that encourages the movement of Midtown office construction westward;
>
> Fourth, to help upgrade public facilities in the project area, particularly the Times Square subway station;
>
> Fifth, to increase the project area's economic contribution to the City as a whole, both through increased revenues to the City and expanded private investment and employment opportunities; and
>
> Sixth, to restore the project area's role as a positive influence on the adjacent communities, notably the theater district, the garment center, and the Clinton residential neighborhood, and as a productive link

among these communities and the expanding midtown office district."

The FEIS describes the substantial new construction intended to achieve these Project goals. Four office towers, ranging in height from 29 to 56 stories, will be built at the east end of the Project area, while the west end will be anchored by a 20-story wholesale mart and a hotel. Nine historic theatres will be restored for the live stage, and the Carter Hotel and historic Candler Building will be retained. The remaining mid-block sites will be reconstructed for retail use, with the FEIS indicating that the character of the retail uses will differ substantially from the current uses:

> "When completed the project will eliminate or alter nearly all of the special uses in the project area. Specifically, there will be no action or pornographic movies, sex-related establishments, or pinball arcades. Subway entrances and mezzanine will be redesigned to bring clarity and light to underground spaces. The new development will contain some fast food places and certainly, restaurants selling beer or liquor, but these establishments will play an important role in supporting a new mix of uses: theaters, first-class offices, a hotel, and wholesale mart." [1]

An integral part of the Project is the reconstruction and improvement of the Times Square subway station,

---

[1] At the December 12, 1984 hearing on defendant's motion to dismiss, defendants argued that any FEIS statements suggesting that businesses of the sort run by plaintiffs would be excluded from the Project's retail establishments upon completion of the Project were merely "predictions" as to what mix of uses would be produced by independent market forces.

currently one of the busiest but also one of the most poorly-organized and crime-ridden in the transit system. The FEIS estimated that the Project would generate more than $650 million in additional real estate taxes to the City by the year 2005 and would add 21,000 net jobs to the Project area.

The UDC's Board of Directors approved the FEIS on October 4, 1984. After holding public hearings on the plan, the City's Board of Estimate approved it on November 8, 1984. The UDC published the findings required by the Eminent Domain Procedure Law on November 15 and 16. After all necessary requirements have been completed, the UDC intends to acquire the property needed to effectuate the Project.

In the meantime, on October 19, 1984, the four plaintiffs in this action, all of whom sell sexually-oriented books and magazines, films and video tapes, or exhibit and present sexually-oriented films, tapes, dances, or performances, filed their complaint. Count I concedes that "all [businesses] located in the Project area will be removed by the condemnation," (¶¶ 8, 27) but asserts that the various Project documents indicate that only businesses of the sort plaintiffs operate will not be permitted to relocate in the Project's retail locations (¶¶ 8, 27, 95).

The complaint alleges that the governmental actions destroying plaintiffs' property but denying them the right to relocate, which plaintiffs contend are merely a continuation of selective enforcement of various laws against them in recent years, constitute an unconstitutional prior restraint, a classification of speech on the basis of content in violation of the First and Fourteenth Amendments, and an impermissible retroactive destruction of First Amendment rights.

Count II of the complaint alleges that since the Project documents fail adequately to establish that plaintiffs' businesses contribute to dangerous conditions in the area no justification exists for the UDC's use of its eminent domain power against them, and that condemnation is improper because the "less drastic means" of "police sweeps" could be used to reduce crime in the Project area. The complaint seeks $12 million in damages, a declaration that the Project violates plaintiffs' constitutional rights, a preliminary and permanent injunction, and reasonable attorney's fees.

Appellees moved to dismiss the complaint pursuant to Rule 12(b)(1) & (6), Fed. R. Civ.. P., on ripeness and abstention grounds; the private developers urged that they were not properly joined as defendants in the action. In affidavits accompanying the motions to dismiss, defendants Sturz (Director, New York City Department of City Planning, and Chairman, City Planning Commission) and Stern (Chairman, UDC) denied that any arbitrary use restrictions would be imposed to prevent plaintiffs from relocating in the retail establishments in the Project area after the condemnation and redevelopment process is completed.

Chief Judge Motley heard oral argument on the motions on December 12, 1984. Although the motions had been fully briefed and submitted by the date of the hearing, appellant was given an opportunity to submit additional sur-reply papers. By decision and order dated February 5, 1985, the district court converted defendants' Rule 12(b)(6) motion to one for summary judgment, granted judgment in favor of defendants and denied plaintiffs' motion for preliminary injunctive relief. The district court noted that "by and large, plaintiffs do not

challenge the essential factual content of the FEIS, but merely seek to interpret it differently than do defendants." The court reviewed the FEIS' findings regarding the physical and social blight in the Project area, its stated goals for the Project, and the means for accomplishing these goals. It concluded:

> "The Project serves substantial state interests in eliminating physical and social blight in the form of underutilized and decaying buildings, violent crime, prostitution, and drug dealing. It seeks to preserve the area's historic theaters, overhaul the subway stations, provide a wholesale merchandise mart for local industry, and build four major office towers which will bring thousands of new people into the neighborhood while significantly increasing the area's tax base.
>
> "These goals, in and of themselves, are substantial, important, and unrelated to the suppression of free speech . . . ."

Although the district court found a substantial basis for the Project independent of any desire to suppress speech, it also concluded that "the government defendants have an official policy of hostility towards adult uses," and that the Project would have some impact on the dissemination of sexually explicit materials, if only from the fact that many businesses selling such matter would at least temporarily be displaced.

Judge Motley rejected defendants' arguments that the court should abstain, that none of plaintiffs' claims were ripe for determination, and that the private developers had not been properly named as parties to the action. The claim that the Project constituted a prior restraint was rejected "for one simple reason: Whatever the varied

motivations behind the Project, in actual application the plan does not single out plaintiffs' speech for special treatment." She rejected plaintiffs' argument that the Project is unnecessarily suppressive of speech, concluding that it satisfied the test enunciated in *United States* v. *O'Brien*, 391 U.S. 367 (1968), as synthesized in *Young* v. *American Mini Theatres*, 427 U.S. 50, 79-81 (1976) (Powell, J., concurring). (See p. 5618, *infra*). In concluding that the Project did not unnecessarily restrict plaintiffs' speech the district court was especially influenced by the fact that a substantially less restrictive plan could not be expected to fulfill the goals of the Project and that the general availability of sexually explicit material would not be severely curtailed by closing plaintiffs' businesses, since several dozen adult uses would remain within a few blocks of the Project area.

Having found that the Project served legitimate, substantial public purposes and that it satisfied the *Young-O'Brien* analysis, Judge Motley declined to decide an issue plaintiffs had repeatedly adverted to, the constitutionality of the City's zoning restrictions concerning coin-operated machines, such as those used for peep shows, since that issue had not been raised in the pleadings. Noting that the court had examined matters beyond the pleadings in making its findings of fact, and that all parties had had ample opportunity to present all relevant material to the court, Judge Motley treated defendants' motion as one for summary judgment, pursuant to Fed. R. Civ. P. 12(b)(6) and 56. Deciding that there were no material questions of fact to be determined at trial, the court granted the motion for summary judgment.[2]

---

[2] The district court summarily denied plaintiff's March 1, 1985, motion for reargument of the February 5, 1985 order, which con-

[Footnote continued on following page]

DISCUSSION

Before we may consider the merits of the district court's grant of summary judgment dismissing the complaint we must first decide whether, as appellant contends, the district court failed to give it sufficient notice that defendants' motion for dismissal was being converted under Rule 12(b)(6), Fed. R. Civ. P., into a Rule 56 motion for summary judgment. If insufficient notice and an opportunity to respond were afforded, it would be necessary for us to reverse the dismissal and remand the case for further proceedings.

Rule 12(b)(6) permits the district court to consider matters outside the pleadings and to treat a motion for dismissal as one for summary judgment provided "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 56(c), in turn, provides that "[t]he motion shall be served at least 10 days before the time fixed for the hearing" and that the adverse party may serve opposing affidavits. Compliance with these requirements, however, is not an end in itself. The district court's conversion of a Rule 12(b)(6) motion into one for summary judgment is governed by principles of substance rather than form. The essential inquiry is whether the appellant should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or was taken by surprise and deprived of a reasonable opportunity to meet facts outside the pleadings.

[Footnote continued from previous page]

tended that (1) the district court had converted defendants' motion to dismiss without adequate notice to plaintiffs, and (2) plaintiffs had been deprived of an opportunity to prove the diminution of access to adult materials.

Resolution of this issue will necessarily depend largely on the facts and circumstances of each case. *See, e.g., Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 523 F.2d 389, 393 (6th Cir. 1975). A party cannot complain of lack of a reasonable opportunity to present all material relevant to a motion for summary judgment when both parties have filed exhibits, affidavits, counter-affidavits, depositions, etc. in support of and in opposition to a motion to dismiss, *see, e.g., National Family Ins. Co.* v. *Exchange Nat'l Bank of Chicago*, 474 F.2d 237 (7th Cir.), *cert. denied*, 414 U.S. 825 (1973). Even where only the party moving to dismiss has submitted extrinsic material such as depositions or affidavits, the opposing party may be deemed to have had adequate notice that the motion to dismiss would be converted, *see, e.g., Condon* v. *Local 2944, United Steelworkers of America*, 683 F.2d 590, 593-94 (1st Cir. 1982) (no surprise where defendant supported motion with affidavits and plaintiff had time to furnish information raising a genuine factual issue); *Cook* v. *Hirschberg*, 258 F.2d 56, 57-58 (2d Cir. 1958) (defendants' filing of affidavits with their motion to dismiss both converted it to a motion for summary judgment and put plaintiffs on notice of their obligation to disclose the merits of their case).

Applying these principles here, we find that appellant had ample opportunity to present relevant material outside the record in reply to plaintiffs' submissions and did so. Indeed, from the outset appellant itself submitted materials outside the record. Plaintiffs attached 14 exhibits containing factual materials, including the FEIS, to their complaint, and submitted affidavits and other documents relating to the merits both in support of their motion for a preliminary injunction and in opposition to defendants' motion to dismiss, which were simultaneously

considered by the court. At a hearing on December 12, 1984, plaintiffs commented on the factual material provided by them and by defendants. After the hearing, on December 17, 1984, plaintiffs requested and received an extension of time, until December 31, 1984, to submit additional materials. Appellant thus cannot claim to have been unaware that the district court was considering material outside the record or that it lacked notice of the possibility that the district court would convert the motion to dismiss into a motion for summary judgment. The cases on which appellant relies are distinguishable. In *Dale* v. *Hahn*, 440 F.2d 633 (2d Cir. 1971), the court held that it was error for the district court to have converted the 12(b)(6) motion when the district court considered material the defendant had submitted after giving no indication that it would consider anything but the pleadings, while *Beacon Enterprises, Inc.* v. *Menzies*, 715 F.2d 757 (2d Cir. 1983), involved the special situation of a pro se plaintiff.

Turning to the merits, appellant maintains that the condemnation of its property constitutes a prior restraint on activities protected by the First Amendment. We disagree. Governmental action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated. This may take the form of orders prohibiting the publication or broadcast of specific information, *see, e.g., Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976) (order restraining media from publishing or broadcasting accounts of confessions, admissions, or other facts implicating accused); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (per curiam) (order enjoining publication of Pentagon Papers), or systems of administrative preclearance that give public authorities the power to bar the

publication or presentation of material, *see, e.g., Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975) (procedures governing rental of theatre "gave public officials the power to deny use of a forum in advance of actual expression"); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 69-72 (1963) (Rhode Island administrative book review procedure identified "objectionable" books and effectively prevented their continued publication and circulation).

In this case plaintiffs' activities have not been singled out for special treatment. The Project is not aimed at suppression of speech but at eliminating community blight, crime and decay and at restoring the area to commercial and cultural vitality. Plaintiffs' businesses constitute only 1% of the total number of businesses to be displaced. Sex-related establishments within the Project area represent only 5% of all businesses displaced and 3.2% of the total gross square footage to be acquired. The Project is content-neutral and comparable to that before the Supreme Court in *Young* v. *American Mini Theatres, supra*, 427 U.S. at 62, where the Court found no prior restraint in a requirement that adult motion picture theatres be licensed when all motion picture theatres in a city were required to be licensed and were subject to locational and other requirements. Appellant's reliance on *NAACP* v. *Button*, 371 U.S. 415 (1963), is misplaced; in invalidating a Virginia ordinance prohibiting the solicitation of legal business, the Court did not there discuss the doctrine of prior restraint.

Assuming that the Project, although content-neutral, nevertheless has an incidental effect on speech, there remains only the question whether it satisfies the four-part test relied on by Justice Powell in *Young* v. *American*

Mini Theatres, supra, 427 U.S. at 79-80, and later applied by the Court in *United States* v. *Albertini*, — U.S. —, 53 U.S.L.W. 4844, 4847 (1985). Under that test a governmental regulatory action having an incidental impact on speech will be upheld if (1) the action is within the constitutional power of the government; (2) the action furthers important or substantial government interests; (3) the interests furthered are unrelated to the suppression of free speech; and (4) the restriction on First Amendment freedoms is no greater than is essential to the furtherance of the government interests.

Each of these criteria has been met in the present case. Appellant does not dispute that the UDC has the constitutional power to take property by eminent domain. *See Berman* v. *Parker*, 348 U.S. 26 (1954) (upholding constitutionality of use of eminent domain powers for urban renewal purposes); New York Unconsol. Laws § 6263 (McKinney 1979) (conferring eminent domain power on UDC).

It is beyond dispute that the Project is designed to serve the substantial governmental interests of improving the buildings in the area and promoting use up to the permitted zoning potential, to increase tax revenue from the area virtually six-fold in the next 20 years, to raise employment in the area, to save architecturally and historically significant theatres, and to reduce crime. In view of the many plans for redeveloping the 42nd Street area that private associations, non-profit organizations, and public agencies have put forth since 1960, the decision of the City and UDC that the Project's goals could best be achieved by use of the eminent domain power is entitled to considerable deference:

> "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas [in order to achieve its interest in preserving the character of its neighborhoods]. . . . [T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young* v. *American Mini Theatres, supra,* 427 U.S. at 71 (Opinion of Stevens, J.).

While conceding that the Project area is blighted and that its business is only one of more than 400 businesses of many different types that are to be condemned, appellant argues that these facts are irrelevant, since the findings made in support of the Project by the City and UDC purportedly do not demonstrate that appellant's business contributes to the blight. This argument must be rejected; once it has been shown that the surrounding area is blighted, the state may condemn unblighted parcels as part of an overall plan to improve a blighted area. *Berman* v. *Parker, supra,* 348 U.S. at 34-36 (upholding urban renewal plan in District of Columbia and specifically rejecting claim that only properties that were blighted or that contributed to blight could be taken for such purposes). *Cf. Hawaii Housing Authority* v. *Midkiff,* — U.S. —, 52 U.S.L.W. 4673 (1984) (according wide deference to legislature's land use decisions where its purpose is legitimate and its means are not irrational).

The substantial governmental interests which the Project is designed to serve are unrelated to suppression of free speech. While appearing to concede this, appellant

nevertheless argues that the Project is unconstitutional since some of the Project's documents indicate that the suppression of sex-related businesses may have been at least *a* motivating factor in designing the Project. A subjective motivation on the part of some proponents of the Project to suppress sex-related businesses does not render it unconstitutional, provided the Project is justified by substantial government interests independent of such motive. In *O'Brien, supra,* the Court stated: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." 391 U.S. at 383. *Cf. Hart Book Stores, Inc.* v. *Edmisten,* 612 F.2d 821, 829 (4th Cir. 1979), *cert. denied,* 447 U.S. 929 (1980) ("relevant question under *O'Brien* is not whether the perceived 'legislative motive' for legislation is unrelated to the suppression of free expression, but whether an identifiable 'governmental interest' is so unrelated"). Here important governmental interests unrelated to suppression of speech exist, independent of any desire to suppress speech.

Appellant's reliance on *Playtime Theaters, Inc.* v. *City of Renton,* 748 F.2d 527 (9th Cir. 1984), *jur. noted,* 105 S. Ct. 2015 (1985), and *Tovar* v. *Billmeyer,* 721 F.2d 1260 (9th Cir. 1983), *cert. denied,* 105 S. Ct. 223 (1984), is misplaced. Both cases are distinguishable since, unlike the situation here, the regulations involved in those cases were not content-neutral and the records were inadequate in both cases to determine whether either city had substantial reasons unrelated to the suppression of speech for the zoning regulations that restricted speech.

In interpreting the fourth *O'Brien* factor, i.e., that the restriction on First Amendment freedoms must be no

greater than is essential to the furtherance of the governmental interests, the Supreme Court has recently stated that "an incidental burden on speech is no greater than is essential, . . . so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States* v. *Albertini, supra,* — U.S. at —, 53 U.S.L.W. at 4848. In making this determination courts will not second-guess the decisions of responsible government officials acting within constitutional constraints. *See Clark* v. *Community for Creative Non-Violence,* — U.S. —, 52 U.S.L.W. 4986 (1984) (*O'Brien* does not "assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained."); *see also United States* v. *Albertini, supra,* — U.S. at —, 53 U.S.L.W. at 4848 (*O'Brien* does not assign to the judiciary the authority to manage military facilities throughout the Nation.

Applying these principles, we find that the City and UDC acted within the bounds of the Constitution in concluding that use of the eminent domain power would be a more effective means of achieving the Project's goals than would other means. Appellant maintains that the City and State could have used the less drastic means of "police sweeps," which it claims have been successful outside of the Project area. We agree with the district court's reasonably-based and fairly evident conclusion that "a substantially less restrictive plan [than that of the Project] could not be expected to fulfill the goals of the Project." With reference to police sweeps, the court concluded that they might only serve to move crime to another area or temporarily mitigate the overall climate of crim-

inal activity in the area, while doing nothing to remedy the physical blight resulting from decaying buildings and underused property. Absent evidence (and none was proffered) that police sweeps would be a less restrictive and equally effective means of accomplishing the Project's goals, we will not substitute our judgment for that of the responsible officials of the City and UDC who, after long study of the problem, concluded that use of the eminent domain power will more effectively achieve the substantial governmental interests involved.

In concluding that the final *O'Brien* criterion has been satisfied we agree with the district court that "the general availability of sexually explicit material in the midtown area will not be severely curtailed by the closing of plaintiffs' businesses, because several dozen adult uses will remain within a few blocks of the Project area." This conclusion is supported by FEIS Figure 2-15, attached as Exhibit A to UDC Chairman Stern's affidavit and not refuted. The exhibit reveals that in June 1983 there were 72 sex-related uses in the area between 33rd and 59th Streets, from 6th to 8th Avenue. Since 24 of these uses are in the Project area, which is limited to three square blocks within the entire City of New York, there will be a reduction of only 33% in sex-related uses in the midtown Manhattan area. Thus 48 sex-related uses would remain in the midtown area alone. These figures, moreover, do not take into account possibilities for relocation by businesses displaced from the Project area or concentrations of sex-related uses in other areas of Manhattan and in the other boroughs.

Appellant cannot seriously question any of these material and significant facts. It seeks to maximize the Project's impact, however, by arguing that it would re-

duce by 79% the number of sex-related establishments *within a three-block radius around the Project area.* However, the relevant area for present purposes is much larger, extending at least to midtown Manhattan (i.e., from 33rd to 59th Streets) where a large number of sex-related uses would continue to exist. In an effort to counter the insubstantiality of the overall reduction in sex-related uses that would result from the Project appellant asks us, in judging the Project's effect, to distinguish between specific types of use (e.g., books stores, peep shows, adult movies, topless bars, swingers' clubs) rather than consider them collectively, and points out that in filing for building permits there are different requirements for some of these uses. Appellant argues that, depending on the size of the midtown area that is used as the yardstick, the diminution in some specific uses caused by the Project would be greater than that shown by Chairman Stern's figures (see FEIS Figure 2-15).

We do not believe that such use-fragmentization is constitutionally mandated or that the extent to which a governmental action in the public interest incidentally burdens speech must be judged by the most adversely affected specific use, as distinguished from other closely related uses. When the availability outside the Project area of adult movies and live shows is added to that of book stores, peep shows and multiple uses, any diminution in access to such materials wrought by the Project would not be of constitutional significance. But even if the effect were assessed on a specific-use basis the restriction would not be sufficient to label it unconstitutional. FEIS Figure 2-15 shows that in June 1983 there were nine book stores, peep shows and multiple uses in the midtown Manhattan area, outside of the Project area itself. This figure

does not take into account the number of such establishments in other parts of New York City or anticipated relocations from the Project area. In short, since the Project area presently supports 15 such businesses the law of supply and demand may be expected to lead to their appearance elsewhere.

Appellant responds that it will be prevented from effectively relocating by a New York zoning regulation which provides that establishments with four or more coin-operated amusement devices may locate only in areas zoned for amusement arcades. This contention must be rejected; the Constitution does not entitle a person to distribution of information in precisely the same form as that in use by the least expensive means of expression, as long as a comparable method is available. *Gannett Satellite Information Network, Inc.* v. *Metropolitan Transportation Authority*, 745 F.2d 767, 774 (2d Cir. 1984); *see also Heffron* v. *International Society For Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Appellant has available to it numerous other unrestricted means of exhibition, including use of machines that are not coin-operated, books, magazines, movies, video cassettes and live shows purveying the same information.

For the foregoing reasons the complaint was properly dismissed as a matter of law upon the undisputed facts. Our affirmance of the district court's dismissal of the complaint carries with it an affirmance of its denial of preliminary injunctive relief. Since appellant failed to show either probable success on the merits or a combination of serious questions going to the merits and a balance of hardships tipping toward appellant, there was no abuse of discretion in denying such relief, *Citibank, N.A.* v. *Citytrust*, 756 F.2d 273, 275 (2d Cir. 1985); *Sierra Club*

v. *Hennessy*, 695 F.2d 643, 649 (2d Cir. 1985); *Triebwasser & Katz* v. *A.T.&T.*, 535 F.2d 1356, 1358 (2d Cir. 1976).

The order of the district court is affirmed.

United States Court of Appeals

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of August one thousand nine hundred and eighty-five.

Present: HON. WALTER R. MANSFIELD
HON. ELLSWORTH A. VANGRAAFEILAND
HON. LAWRENCE W. PIERCE
Circuit Judges,

No. 85-7190

G. & A. BOOKS, INC., 250 BOOK CENTER, INC., COURAGEOUS BOOKS, INC., and M.J.M. EXHIBITORS, INC.,

Plaintiffs,

M.J.M. EXHIBITORS, INC.,

Plaintiff-Appellant,

– against –

WILLIAM J. STERN, individually and as Chairman of the New York State Urban Development Corporation, WILLIAM H. DALY, individually and as Director of the Office of Midtown Enforcement of the City of New York, STEVEN SPINOLA, individually and as President of the Public Development Corporation of the City of New York, HERBERT J. STURZ, individually and as Chairman of the City Planning Commission of the City of New York, EDWARD I. KOCH, individually and as Mayor of the City of New York, THE CITY OF NEW YORK, PARK TOWER REALTY CORP., PLANNING INNOVATIONS, INC., TISHMAN SPEYER PROPERTIES and EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

Elaine B. Goldsmith,
Clerk

By: Edward J. Guardaro,
Deputy Clerk

APPENDIX B

United States District Court

Southern District of New York

----------X

G. & A. BOOKS, INC., 250 BOOK CENTER, INC., COURAGEOUS BOOKS, INC., AND M.J.M. EXHIBITORS, INC.,

Plaintiffs,

— against —

WILLIAM J. STERN, individually and as Chairman of the New York State Urban Development Corporation, WILLIAM H. DALY, individually and as Director of the Office of Midtown Enforcement of the City of New York, STEVEN SPINOLA, individually and as President of the Public Development Corporation of the City of New York, HERBERT J. STURZ, individually and as Chairman of the City Planning Commission of the City of New York, EDWARD I. KOCH, individually and as Mayor of the City of New York, THE CITY OF NEW YORK, PARK TOWER REALTY CORP., PLANNING INNOVATIONS, INC., TISHMAN SPEYER PROPERTIES and EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendants.

----------X

84 Civ. 7565 (CBM)

APPEARANCES:

RALPH J. SCHWARZ, JR.
122 East 42nd Street
Suite 2117
New York, N.Y. 10168
Attorney for Plaintiff

LEAHEY & JOHNSON, P.C.
By: Peter James Johnson
120 Wall Street, Suite 2220
New York, N.Y. 10005
Attorneys for Defendant Stern.

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel
By: Gary Schuller
100 Church Street
New York, N.Y. 10007
Attorney for Defendants
Daly, Spinola, Sturz, Koch,
and City of New York.

PAUL WEISS RIFKIND WHARTON
& GARRISON
By: Martin Flumenbaum
345 Park Avenue
New York, N.Y. 10154
Attorneys for Defendants
Tishman Speyer Properties
and Equitable Life Assurance
Society of the United States.

SHEA & GOULD
By: Dean G. Yuzek
330 Madison Avenue
New York, N.Y. 10017
Attorneys for Defendant
Park Tower Realty Corp.

DEMOV MORRIS LEVIN & SHEIN
By: Robert Hammerling
40 West 57th Street
New York, N.Y. 10019
Attorneys for Defendant
Planning Innovations, Inc.

Motley, Ch. J.

OPINION

Plaintiffs, all in the business of selling and exhibiting sexually-explicit books, films and performances, sue to enjoin the destruction of their businesses by the Forty-Second Street Development Project. Plaintiffs claim that one of the motivatons behind the Project, which will attempt to upgrade the Times Square area by building four large office towers, a hotel, and a merchandise mart, is to put them out of business and stifle distribution of sexually explicit, constitutionally protected material. They maintain that the Project's blight findings with regard to adult uses are inadequate, that the Project constitutes a prior restraint, that it violates the First Amendment and the Equal Protection Clause by in effect zoning retroactively on the basis of content, and that the Project fails to use the least restrictive means in furthering whatever legitimate goals it *does* have. Plaintiffs seek a preliminary injunction to stop the planned condemnation of the buildings on Forty-Second Street in which their businesses operate.

Defendants, myriad city and state officials with responsibility for the Project, and the private developers, respond that the Project is fully justified by the blight findings already made, that sexually explicit speech is not being singled out, that plaintiffs will not be denied access to the Project's new commercial locations, and that even if they were, it would not give rise to a constitutional claim. Defendants move to dismiss on the merits and on the doctrines of abstention and comity. In addition, the private developer defendants argue that they are not proper parties to this action.[1]

The case at bar requires the court to reconcile two broad strains of recent constitutional law. On the one hand, it has long been settled that the political branches of government have broad latitude in land use planning. *See Berman v. Parker*, 348 U.S. 26 (1954). The Supreme Court has in recent years stressed that this deference extends to the role of local government both in formulating goals for planning and in devising means within the state's police power to attain those goals. *See Hawaii Housing*

Authority v. Midkiff, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Indeed, this flexibility is necessary if government is to formulate and implement creative solutions to blight, crime, pollution, and others problems related to land use.

On the other hand, this deference must give way in the face of a substantial claim of infringement on a constitutionally protected right. For example, the federal courts have exhibited an increasing sensitivity to the negative impact of ostensibly neutral city planning devices on constitutionally protected speech. They have refused to defer completely to local government and instead have scrutinized both the ends and means of regulation to determine if it is unconstitutionally suppressive of speech. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Young v. American Mini Theatres*, 427 U.S. 50 (1976). It is a deep tradition in First Amendment law that government may not escape scrutiny of its attempts to suppress speech merely by labelling its action as neutral regulation; it is the operation and effect of government action, not its form, that matters. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 708 (1931).

In light of this potential conflict between important constitutional values, the extreme positions staked out by plaintiffs and defendants in this case are not particularly helpful. Plaintiffs urge the easy to grasp but logically flawed proposition that any government regulation which has the effect of curtailing speech is perforce an unconstitutional prior restriant. It is obvious, however, that countless forms of government activity, from taxation to regulatory enforcement to criminal prosecutions, may limit the exercise of speech rights. The question is whether the government restriction is *content-based* or singles out speech activities for special burdens, or if the effect on speech is merely incidental to a legitimate and neutrally enforced regulatory scheme. This inquiry nevertheless requires a closer examination of government ends and means than would be permitted under the extremely deferential due process approach urged by defendants.

Having made this examination, the court concludes that plaintiffs have failed to meet their burden in justifying a preliminary injunction, that there are no material facts in dispute, and that defendants are entitled to judgment as a matter of law. In reaching these conclusions, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT:

The Forty-Second Street Development Project is a large-scale redevelopment scheme jointly undertaken by the City and the State which would dramatically alter the physical, social, and cultural environment of the Times Square area. The Project emerged after years of false starts and failed initiatives by public officials seeking to bring renewal to Forty-Second Street. The present plan is the product of a lengthy, statutorily mandated land use review procedure which included extensive public hearings and resulted in hundreds of pages of detailed findings on the Project's impact. Even a brief, partial summary of these proceedings and findings is sufficient for this court to conclude that substantial and important public purposes underlie the Project.

The present initiative in Times Square was launched on June 27, 1980 with a Memorandum of Understanding between the City and the State's Urban Development Corporation (UDC). The Memorandum provided that the City and the UDC would jointly prepare a plan and designate a developer, and that the UDC would have primary responsibility for implementation of the plan. Following technical studies, the City and the UDC jointly issued a report in February 1981 entitled "Forty-Second Street Development Project: A Discussion Document," which described the potential Project's goals and possible boundaries. In June 1981, the City and the UDC issued joint Design Guidelines and a formal Request for Proposals. Following the submission in September 1981 of responses from private developers, conditional designations were made of developers for the construction and operation of four office towers, a merchandise mart, a hotel, and renovated theaters in the Project. *See* Affidavit of Defendant Herbert Sturz at 2-4.

In November 1982, the UDC formed the Times Square Redevelopment Corporation as its subsidiary and entrusted it with the primary responsibility for the development of Times Square. Working with the City, the TSRC formulated the details of the current Forty-Second Street Development Project. A draft environmental impact statement was prepared and circulated pursuant to state law, and public hearings were held at Town Hall in Manhattan in March, April, and September of 1984. Scores of public officials, property owners, local residents, and other members of the public testified and submitted written comments on the Project. The Final Environmental Impact Statement (FEIS) was issued in August 1984, and following the receipt of additional public comment, the final document was approved by the UDC's Board of Directors on October 4, 1984. The Board also adopted findings pursuant to the State's Eminent Domain Procedure Law. *Id.* at 4-5.

In accordance with the original Memorandum of Understanding, the Project was submitted to the City's Board of Estimate, which held a public hearing on October 25 and November 8, 1984 and then unanimously approved the plan. The UDC officially published its findings on November 15 and 16, 1984, and intends to proceed with condemnation of property in the Project area as soon as preliminary procedures are completed. *Id.* at 5.

The FEIS is the primary document containing the factual basis for the Project. It reviews in detail present problems in Times Square and assesses the Project's probable impact in several areas: land use and community resources, social and street conditions, historic resources, economic resources, traffic and transportation, air quality, noise levels, water resources, waste disposal, and energy resources. It should be noted that, by and large, plaintiffs do not challenge the essential factual content of the FEIS, but merely seek to interpret it differently than do defendants. The following factual findings, which are only highlights of some of the most pertinent parts of the FEIS, do not appear to be disputed and are adopted by the court.

The FEIS finds that the 13-acre Project area, which includes Forty-Second Street from Broadway to Eighth Avenue and parts of the adjacent blocks on Forty-First and Forty-Third Streets, suffers from severe physical and social blight including decaying and underutilized buildings, depressed property values and tax revenues, drug dealing, violent crime, loitering, and prostitution.

Specifically, the FEIS finds that the land use potential of the Times Square area is dramatically unfulfilled. At present, only 24 to 34 percent of the potential zoning capacity has been built, and approximately 16 percent of the Project area is devoted solely to surface parking lots. FEIS at 2-7. Twenty percent of all space in the area, and 34 percent of commercial and office space, is vacant. *Id.* at 2-13. Many buildings in the area are decaying and obsolete and most are too small to meet modern business needs. *Id.* at 2-13-17. No new major construction has taken place in the Project area in 50 years. *Id.* at 1-4. In addition, "fragmented" diversity of ownership makes private attempts at redevelopment difficult. *Id.* at 2-17.

The FEIS reports that only about 4,000 people work within the entire Project area. By comparison, between 4,000 and 5,000 people would be employed in one 1,000,000 square foot office building. FEIS Executive Summary at S-8. The area is expected to generate approximately $5.4 million in property taxes in 1984-85. A single building located a block away from the area, the New York Telephone Building, is expected to generate $6.2 million in the same period. *Id.*

The Project, by consolidating land ownership and developing four large office towers, a hotel, and a merchandise mart, is expected to generate at least $776 million in taxes and payments to the city between 1983 and 2005, compared to an estimated maximum of $123 million if the Project were not built. In addition, at least $40 million will be contributed by developers for theater renovation and subway improvements, and 21,000 jobs will be added to the Project area. *Id.* at S-13.

The Project also seeks to preserve a part of the area's history through the preservation of the architecturally significant theaters on 42nd Street.

Plaintiffs have made much of the statement within the FEIS that problems of physical blight are "no more than a backdrop" for the social problems of Times Square, arguing that this proves that the Project's justification rests largely on the eradication of adult uses. However, the foregoing facts demonstrate that physical blight and underutilization are a serious problem in Times Square and an important target of the Project. Moreover, examined in context, the quoted line clearly refers to physical blight as "no more than a backdrop" only in the sense that social conditions are what primarily cause people to be uncomfortable on the street in Times Square. *Id.* at 2-56. Nowhere does the FEIS suggest that physical blight is not an important independent problem.

The FEIS does find, however, that these unpleasant and frightening street conditions also stand in the way of Times Square's commercial and cultural renewal. The Midtown South police precinct, which includes the Project area, ranked first in felony complaints for the entire city for each of the last six years. FEIS at 2-81. Despite success by the police at curbing or at least displacing female prostitution in the area, and police sweeps which have reduced street crime levels temporarily, the blocks within the Project remain favorites for drug dealers, male prostitutes, and muggers. *Id.* at 2-87-89.

Beyond crime, the FEIS finds that several factors contribute to a generally tawdry and unpleasant ambiance in the Project area which discourages development and attendance in Times Square by many sectors of the public. The wide, overhanging movie marquees on Forty-Second Street provide a natural shelter for the assortment of drug pushers, three-card Monte dealers, chain snatchers, alcoholics, homeless people, and general loiterers who make up the permanent population of Times Square. While many of these people engage in no criminal activity and are victims rather than victimizers, the FEIS concludes that the total ambiance on the street is frightening to

passersby. *Id.* at 2-57-58, 75. In addition, reported crimes in the theaters themselves are frequent. *Id.* at 2-57.

Adult bookstores, such as those operated by plaintiffs, are said to contribute to the general street ambiance because of two characteristics. First, most adult uses have either opaque windows or window displays which nevertheless obscure the view in and out of the store. This provides a measure of privacy for customers, but also discourages "eyes on the street" interaction between businesses and their blocks, which is thought to discourage crime and loitering. Second, since customers seeking sexually explicit material are said to "hurry in and out", the sidewalks outside of these stores are left free for loiterers. *Id.* at 2-58. The FEIS nowhere suggests that crime is *caused* by adult books stores, merely that the presence of such establishments, particularly those that are poorly maintained, contributes to the overall tawdry ambiance and provides a place where loitering can take place. *Id.*

Plaintiffs argue that since the FEIS does not specifically include plaintiffs' storefronts in its brief description of favorite "hang-out" spots for loiterers, *id.* at 2-79, the FEIS has failed to support any connection between plaintiffs and loitering. However, a careful reading of the FEIS section on loitering, *id.* at 2-75-80, reveals that Forty-Second Street between Seventh and Eighth Avenues — the core block of the Project and the location of plaintiffs' stores and many other adult uses — is a major center for loiterers.

Although the FEIS only includes adult uses as one of many contributors to the atmosphere of Times Square — along with pinball arcades, fast food restaurants, and bars — the document is replete with negative statements about such uses and a significant amount of space is devoted to cataloguing adult establishments. *See id.* at 2-59-61. Plaintiffs argue that since the FEIS fails to establish that adult uses in and of themselves are a major cause of blight or crime in Times Square, the attention given to adult uses proves that defendants are motivated by hostility towards the content of plaintiff's materials and that a major goal of the Project is to eradicate pornography.

Plaintiffs are correct that the Project's planners have displayed a pronounced hostility to adult uses that appears to reflect official City and State policy. Nine pages of the FEIS are devoted to assessing the possibilities for relocation of adult uses, *id.* at 2-103-12, as opposed to one full page devoted to the possible relocation of crime from the Project area. *Id.* at 2-117-18. The FEIS presents as a "worst case scenerio" the possibility that all the present adult uses in the Project area would seek to relocate elsewhere the city, *id.* at 2-103, and states with apparent pride that there will be no sex-related uses in the Project after completion. *Id.* at 2-95. The FEIS Executive Summary describes the negative impact that a new concentration of adult uses would have on the northern Times Square area. *Id.* at S-12. In addition, the FEIS reports with approval that the City's Office of Midtown Enforcement (OME), which is devoted to curbing such illegal activities as obscenity and prostitution, was successful in reducing adult uses in midtown Manhattan from 132 and 65 between January 1979 and December 1983. *Id.* at 2-92.

The FEIS's section on mitigation of the impact of the Project outlines legal methods, such as criminal enforcement and code compliance inspections, that the city will use to make sure that relocated adult uses are conducted lawfully. *Id.* at 5-7. However, the FEIS makes it clear that the government's policy is to discourage adult uses from relocating at all. The FEIS notes that administrative interpretations of current zoning limit establishments with four or more coin operated machines to a few specified amusement zones outside of Manhattan. If pending court challenges to this zoning are successful, the FEIS reports, the City will be limited in its ability "to prevent, through zoning, the re-opening of peep shows." *Id.* at 5-8. Plaintiffs argue that since their businesses cannot survive economically with fewer than four machines, this zoning would in effect ban them from the borough once they are displaced.

In addition, the FEIS describes the city's policy of working with merchant and civic groups to discourage landlords from renting to adult uses, *id.* at 5-9, and congratulates the OME

for its success in bringing a "legitimate restaurant (the Barking Fish) to a former adult use site." *Id.* at 1-20-21. The foregoing represents just a brief sampling of the negative statements about adult uses with which the FEIS and other Project documents are rife.

Nevertheless, government officials now insist that the Project and the City are neutral as to lawful adult uses, and that no discriminatory restrictions will be placed on the ability of sex-related businesses to relocate in the finished Project are. *See, e.g.*, Affidavit of Herbert Sturz at 2; affidavit of William J. Stern at 3. Defendants seek to characterize statements in the FEIS and elsewhere that there will be no adult uses in the completed Project as mere predictions of what market forces will produce in the upscaled Project. Transcript of oral argument at 30. In light of the above, however, these statements seem a trifle disingenuous. The court concludes that there is sufficient evidence in public documents concerning the Project to show that the government defendants have an official policy of hostility towards adult uses. This conclusion is bolstered by an examination of prior cases in which the city's selective enforcement of valid building code provisions in order to shut down sex-related establishments was enjoined as unconstitutional. *See, e.g., Show-World Center, Inc. v. Walsh*, 438 F. Supp. 642 (S.D.N.Y. 1977); *Black Jack Distributors, Inc. v. Beame*, 433 F. Supp. 1297 (S.D.N.Y. 1977). In light of sworn statements by the responsible officials, however, the court is unable to conclude as a matter of fact that adult uses will be banned from the completed Project.

Moreover, the court is unable to accept plaintiffs' assertion that eradicating adult uses is the *primary motivation* of the Project — either as an end in itself or as the key to solving the social problems of Times Square. As defendants have argued, transcript at 30, it strains credibility to assert that the City and State would undertake such a massive project, involving investment of more than $1.6 billion, and displacing more than 400 businesses, in order to rid Times Square of a handful of pornographic book stores and a few adult theaters.

Plaintiffs insist that the Project's main stated purpose is to wipe out social blight by displacing special uses, including adult bookstores and theaters, and that the FEIS rests primarily on the connection between plaintiffs' uses and this social blight. In fact, as the cursory review of the facts above demonstrates, the Forty-Second Street Project has been designed to address equally intractable problems of social *and* physical blight, ranging from crime and drug use to diversity of land ownership and obsolete buildings. The Project's justification does not rest on the rather limited demonstrated connection between plaintiffs' adult uses and the social blight of Times Square. The court finds that there exists a substantial independent basis for the project that has nothing to do with the City's undeniable hostility towards purveyers of sexually explicit material.

Notwithstanding these significant, independent state interests in the Project, the court does find that the Project will have some impact on the dissemination of sexually explicit materials, since many businesses purveying such matter will at least temporarily be displaced. The court further finds, however, that since at least three dozen other adult uses will remain within a few blocks of the Project, the overall availability of sexually oriented material will not be severely curtailed in midtown Manhattan.

CONCLUSIONS OF LAW:

Defendants offer several grounds on which the court should avoid the merits of this controversy. Defendants urge the court to exercise its discretion to abstain from deciding the case under the principles of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). In arguing for *Pullman* abstention, defendants seek to characterize this action essentially as one challenging the legitimacy of a blight finding promulgated under an elaborate statutory scheme, challenges to which should be worked out under state law in state court. *Burford* abstention is also said to be warranted because the elaborate state regulatory scheme here implicates important state policies that should be addressed

first by the state court. In a related argument, defendants argue that there is no ripe claim because plaintiffs' fear of exclusion from the new Project area is distant, speculative, and not grounded in fact. In addition, as they did in *Rosenthal & Rosenthal v. New York State Urban Development Corporation, et al.*, No. 84-7229 (S.D.N.Y. Jan. 8, 1985), another case regarding the Project decided by this court, the private developers argue that they should be dropped as defendants because they do not exercise governmental authority and therefore cannot suppress speech unconstitutionally nor condemn land.

Plaintiffs reply that *Pullman* abstention is not called for because the state law involved is not unclear, and the state proceeding provided under section 207 of the New York Eminent Domain Procedure Law is limited to the record of the state administrative proceeding and therefore does not provide an adequate forum for constitutional claims. Similarly, plaintiffs argue that *Burford* abstention is inapposite because rather than seeking to interfere with a comprehensive state regulatory scheme and embroil the federal court in local matters by substituting federal judgment for local processes, here the federal court is being asked to intervene on behalf of an overarching constitutional right. The case is argued by plaintiffs to be ripe because the deprivation they protest is not merely their eventual exclusion from the Project area, but the imminent destruction of their businesses through the condemnation process now poised to begin. The private developers are argued to be proper parties, as in *Rosenthal*, because their actions are so intertwined with those of the involved governmental parties.

None of defendants' arguments present a bar to the court's reaching the merits of this case. For the reasons advanced by the plaintiffs, the court declines to exercise its discretion to abstain. Moreover, the imminent destruction of plaintiffs' businesses makes this an undeniably ripe controversy, notwithstanding any factual question about the City's policy on allowing plaintiffs back into the Project area. Finally, the court denies the motion of the private defendants to dismiss them as improperly joined

parties. If plaintiffs state a cause of action under the first amendment and 42 U.S.C. Section 1983, it may be possible for them to demonstrate that all defendants acted in concert under color of state law to deny plaintiffs their constitutional rights. See *Rosenthal*, slip op. at 7; *Archer Gardens, Ltd. v. Brooklyn Center Dev. Corp.*, 468 F. Supp. 609, 613 (S.D.N.Y. 1979). The court proceeds, then, to consider the merits of the case, and the related questions of whether plaintiffs state a valid cause of action and whether a preliminary injunction ought to be granted against the condemnation of plaintiffs' buildings.

Plaintiffs' legal arguments proceed along two basic paths. First of all, they argue that the condemnation of their buildings for the Project constitutes prior restraint on speech in violation of *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). They argue that the evidence connecting plaintiffs to blight in Times Square in the Final Environmental Impact Statement and other documentation does not meet the traditional heavy burden in justifying a prior restraint.

Plaintiffs insist that relocation within midtown Manhattan will be next to impossible because of restrictive zoning now in effect and the chilling effect on landlords of City efforts to discourage adult uses. Plaintiffs argue, however, that such ability to relocate is legally irrelevent because "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939). *Accord Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975). Plaintiffs suggest that just as many municipalities have turned in recent years to nuisance abatement laws, zoning, and building code enforcement to combat pornography, *see generally* Fahringer & Cambria, The New Weapons Being Used in Waging War on Pornography, 7 Cap. U.L. Rev. 553 (1978), this Project is merely another example of the government's use of allegedly "neutral" land use regulation methods to restrict speech on the basis of content.

Plaintiffs next argue that the Project violates the First Amendment and the Equal Protection Clause by classifying speech on the basis of content and burdening it with overly restrictive regulation. Plaintiffs cite to a long line of cases which hold that time, place, and manner restrictions on speech must be content-neutral. *See, e.g., Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530 (1980); *Erzoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972). The net effect of the Project, plaintiffs argue, is "content control"; City policy statements show that rather than zoning neutrally, the city is punishing plaintiffs for their undesirable speech by putting them out of business.

Since the Project impacts upon speech, plaintiffs continue, the City must use the least restrictive means available to achieve its legitimate goals. Since police "sweep" operations and restrictions on windows and signage could fight much of the social blight of Times Square, as described in the FEIS, plaintiffs argue that the more restrictive alternative of putting them out of business is unconstitutional. Plaintiffs insist that the Project is per se unconstitutional because it amounts to retroactive zoning, and *Young v. American Mini Theatres*, 427 U.S. 50 (1976) only approved prospective zoning of adult uses that did not close any existing theaters. However, even if seen as merely prospective, the plaintiffs argue that the plan is too restrictive.

Defendants argue that the FEIS's blight findings are fully adequate and that therefore the court must apply, as it did in *Rosenthal*, slip op. at 12, only the rational-relationship scrutiny of *Berman v. Parker*, 348 U.S. 26 (1954). Although defendants insist that no discriminatory restrictions will be placed on plaintiffs' ability to relocate within the completed project, and in fact insist that getting rid of pornography is not a major goal of the Project, they also maintain that such a restriction would be justified by the FEIS blight findings under the holding of *Young*.

The standard for granting a preliminary injunction is rigorous and well-settled: plaintiffs must demonstrate irreparable harm, and either a likelihood of success on the merits or substantial questions going to the merits and a balance of hardships tilting in their favor. *Sierra Club v. Hennessy*, 695 F.2d 643, 647 (2d Cir. 1982). Defendants try to limit the case to the speculative, distant, and, they argue, false proposition that plaintiffs will be excluded from the completed Project sometime in the future. On that basis, they argue that no irreparable harm is imminent that would justify an injunction. Moreover, they suggest that no claim exists on which there is any substantial question, much less probability of success on the merits. Because an injunction now could kill the plan, defendants argue that the balance of hardships is in favor of the city.

Despite defendants' attempt to focus the court's attention exclusively on the question of whether plaintiffs will be banned from the Project area, the imminent destruction of plaintiffs' book stores to make way for the Project clearly suffices to show irreparable harm. Nevertheless, in applying the rest of the standard, and in ruling on defendants' motion to dismiss, the court must examine the merits of plaintiffs' underlying claim.

The traditional deference which federal courts must accord to legislative and executive judgments regarding land use, *Berman v. Parker*, 348 U.S. 26 (1954), is inappropriate when First Amendment values are implicated. *Schad v. Borough of Mount Emphraim*, 452 U.S. 61 (1981). Regardless of the form of the government regulation, courts will examine its operation and effect on First Amendment rights to determine its constitutionality. *Near*, 283 U.S. at 708. Therefore, unconstitutional suppression of speech has been found not only when government overtly enjoins speech, *id* at 722-23; *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971), but also where ostensibly neutral regulatory means are used, such as zoning, *Schad*, and taxation. *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958). Moreover, when government seeks to discourage speech, even sanctions short of actual suppression may constitute a prior restraint if they exercise a sufficient chilling effect on protected speech. *Bantam Books v. Sullivan*, 372 U.S. 58 (1963).

That government here uses land use regulation does not then automatically immunize its actions from constitutional scrutiny. We still must examine this Project to see if it constitutes a prior restraint on protected speech, and if it does we must enjoin it unless the government carries the almost insurmountable burden of justifying such a restraint. *See New York Times*, 403 U.S. at 714.

Even if the Project does not act as a prior restraint on protected speech, it must still pass the somewhat less rigorous scrutiny mandated by *United States v. O'Brien*, 391 U.S. 367 (1968), which provides a four-part test for measuring the impact on protected speech of government regulation aimed at non-speech goals. Regulation that has a marginal impact on protected speech is constitutionally acceptable if it is "within the constitutional power of the Government," if it serves "an important or substantial governmental interest," if that interest is "unrelated to the suppression of free expression," and if the resulting curtailment of protected speech is "no greater than is essential to the furtherance of that intererst." *O'Brien*, 391 U.S. at 377.

Variations on the four-part *O'Brien* test have proved helpful in measuring the impact of land use regulations and similar traditionally neutral police powers on protected speech. In upholding a Detroit zoning ordinance which restricted the locations of adult theaters, the Supreme Court in *Young* used a similar analysis. Writing for the plurality, Justice Stevens noted that the ordinance did not close any existing theaters, did not restrict the overall market for protected, sexually explicit speech, and served important government interests in reducing blight. 427 U.S. at 71-72. In his decisive and influential concurrance, Justice Powell synthesized the same points into a formal application of the *O'Brien* test. 427 U.S. at 79-81 (Powell, J., concurring). *See also Schad*, 452 U.S. at 68 n.6, 69; *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1347-48 (9th Cir. 1982); *Purple Onion, Inc. v, Jackson*, 511 F. Supp. 1207, 1226-27 (N.D. Ga. 1981); *see generally* Note, Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of The Nuisance Power, 58 N.Y.U. L. Rev. 1478, 1513-18 (1983).

Upon examining the facts of this case, it becomes clear that the condemnations planned for the Forty-Second Street Development Project, viewed as a whole, pass constitutional muster under both standards. Plaintiffs have failed to demonstrate that the project will act as a prior restraint on their protected speech, or that it will be unnecessarily suppresive under the *O'Brien* standard.

There is no doubt that plaintiffs engage in activities protected by the First Amendment. Films, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952), all kinds of publications, *Lovell v. Griffin*, 303 U.S. 444, 452 (1938), and nude dancing, *Schad*, 452 U.S. at 75-76, are all protected forms of expression. A particular work or performance is presumed to be protected unless it is found to be obscene under the standard enunciated in *Miller v. California*, 413 U.S. 15 (1973). There is no suggestion that plaintiffs' property is being condemned because of any alleged obscenity, so for the purposes of these motions it will be presumed that plaintiffs distribute protected materials.

There is also no question that the Project will have some impact on the plaintiffs' exercise of their First Amendment rights. They will be forced out of the area, and if they cannot relocate, their ability to distribute sexually-explicit material will be curtailed. Nevertheless, the Project does not constitute a prior restraint for one simple reason: Whatever the varied motivations behind the Project, in actual application the plan does not single out plaintiffs' speech for special treatment.

In the cases cited by plaintiffs in which an unconstitutional prior restraint was found, official government action has in some way imposed a restriction directly upon a particular class of speech. For example, in *Near*, 283 U.S. at 702, a newspaper was banned for its scandalous content. In *Bantam*, 372 U.S. at 61-62, certain books were blacklisted as unsuitable for youth. In *Show-World Center, Inc. v. Walsh*, 438 F. Supp. 642, 652 (S.D.N.Y. 1977), a sex-oriented establishment was issued a vacate order in a discriminatory application of the building code.

By contrast, in this case, several hundred businesses in a 13-acre area will be shut down, across the board, and a few of them will be adult uses. Plaintiffs' businesses will be closed in a neutral fashion along with all the others. Plaintiffs cannot and do not argue that their buildings are being singled out for condemnation when whole blocks of commercial buildings are being demolished. The mere fact that their speech will be burdened by this overall condemnation is not enough to make out a prior restraint, because that would prove too much; it would give businesses engaging in protected speech virtual immunity from land use changes.

There exists no such absolute right. A business does not acquire an exemption from the neutral application of land use laws just because it engages in protected speech activities. For example, if the theater in *Show-World* had been vacated as a fire hazard as part of an even-handed enforcement program under which buildings housing many different kinds of uses were neutrally inspected, its owners would not be heard to complain of a First Amendment violation. That the City had expressed hostility towards adult uses might be evidence tending to support an allegation that the theater was being singled out for enforcement, but it would not by itself be enough to transform an otherwise neutral regulatory enforcement into an unconstitutional prior restraint. The City's actions in *Show-World* were only unconstitutional because adult uses were, in fact, singled out for action that was not enforced against others similarly situated.

If, on the other hand, the government had decided to leave standing all the buildings in the Project area, and simply to condemn plaintiffs' stores and replace them with "positive" uses, then plaintiffs might be able to show a prior restraint. If they could, this court would have to apply the strictist scrutiny to the government's blight findings to see if the connection between plaintiffs' businesses and blight was sufficiently direct—and the interest in eradicating that particular kind of blight sufficiently compelling—to justify the drastic remedy of a prior restraint. It is unlikely that the data contained in the FEIS and

other documents could withstand that scrutiny, since the actual connection between adult uses and crime, decay, and drug use is demonstrated tenuously if at all.

Looking at the project as a whole, however, and in the absence of any content-based restriction, the blight findings are adequate. It is not disputed that Times Square suffers from serious physical and social blight, ranging from underutilized and decaying buildings to violent crime, drugs, and prostitution. Viewed from this perspective, it is irrelevent that plaintiffs have not been proven to cause blight. Neither have many of the restaurants, retail shops, and other businesses that will be displaced by the Project. The Project does not purport to shut down only adult uses on the basis of blight findings about such uses alone; it looks towards a wholesale clearing and renovation of entire city blocks on the basis of a well-supported overall finding of blight – blight that is caused by many things *other* than adult uses. So long as protected speech is not singled out for special treatment, this blight may be attacked through a comprehensive land use plan without it constituting a prior restraint.

Although the court finds that the Forty-Second Street Development Project will not act as a prior restraint on plaintiffs' protected speech, it is still appropriate to evaluate the Project under the standards of *O'Brien* and *Young* to gauge whether the condemnation will have an excessive impact on protected speech. The court must approve the plan if it is "within the constitutional power of the Government," if it serves "an important or substantial governmental interest," if that interest is "unrelated to the suppression of free expression," and if the resulting curtailment of protected speech is "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377.

The Project clearly satisfies the first prong of the *O'Brien* test. Condemnation for purposes of urban renewal is a long-recognized exercise of the police power within the constitutional power of local government. *Berman*, 348 U.S. at 33-34.

The court's findings of fact further establish that the second requirement of the test is met. The Project serves substantial state interests in eliminating physical and social blight in the form of underutilized and decaying buildings, violent crime, prostitution, and drug dealing. It seeks to preserve the area's historic theaters, overhaul the subway stations, provide a wholesale merchandise mart for local industry, and build four major office towers which will bring thousands of new people into the neighborhood while significantly increasing the area's tax base.

These goals, in and of themselves, are substantial, important, and unrelated to the suppression of free speech, thus satisfying the third strand of the *O'Brien* analysis. They are not made any less important by the possible existance of any illegitimate state motivation to put adult uses out of business because of the content of the material they purvey.

In evaluating, under the final prong of the *O'Brien* test, whether the Project is unnecessarily suppressive of speech, the court must apply a balancing test which weighs the state's goals against the impact on protected speech. In applying this test, only the legitimate, non-speech goals of fighting blight and crime will be factored into the balance. To the extent that distaste towards sexually explicit material may cause the Project planners to exaggerate the importance of eliminating adult uses, such justifications for the Project must be discounted under the *O'Brien* test.

The court hesitates in concluding that the fourth requirement of the *O'Brien* test is met because of its finding that the Project will have some impact on the distribution of sexually-explicit, presumptively protected materials. Nevertheless, for several reasons explained below, the court concludes that the Project plan is no more suppressive of protected speech than necessary to further its substantial, legitimate, and lawful goals. The condemnation is therefore constitutional as applied to plaintiffs' buildings.

The court finds two facts especially important in reaching this conclusion. First, upon examining the record of failed attempts

to revive Times Square and the paucity of less restrictive alternatives, the court is convinced that a substantially less restrictive plan could not be expected to fulfill the goals of the Project. Plaintiffs insist that large scale police sweeps have been successful in curtailing street crime in the Project area. However, while these sweeps may have displaced crime from one area to another, or temporarily mitigated the overall climate of criminal activity on Forty-Second Street in such a way as to actually decrease total crime, they have not had the permanent effect of really "cleaning up" the street. Crime returns when the sweeps stop, and even with these sweeps, the area still has ranked among the most crime-ridden in the city. Moreover, increased police activity does nothing to address the permanent physical problems of decaying buildings and underutilized property which, despite plaintiffs' characterizations, constitute important targets of the Project.

Second, the court has found that the general availability of sexually explicit material in the midtown area will not be severely curtailed by the closing of plaintiffs' businesses, because several dozen adult uses will remain within a few blocks of the Project area. It is this question of overall public access to protected material, rather than the economic impact on individual commercial distributors, which Justice Powell found decisive in the application of the *O'Brien* test in his *Young* concurrance. 427 U.S. at 78 n.2. (Powell, J., concurring). Justice Powell asked two key questions: "(i) Does the ordinance impose any content limitations on the creators of adult movies or their ability to make them available to whom they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them?" *Id.* at 78. As Justice Powell did in *Young*, this court here answers those questions in the negative.

Plaintiffs point out, however, that the zoning plan approved in *Young* did not shut down any existing adult theaters, but only restricted locations for new ones, and that this distinction was important to the court's holding. *See* 427 U.S. at 62, 71 n.35; *id.* at 81 n. 4 (Powell, J., concurring). Here, by contrast, plaintiffs' stores will be closed. Plaintiffs argue that this amounts to retroactive restrictive zoning in violation of *Young*.

This argument misconstrues the trust of the *Young* opinion, which was not that adult uses could never be shut down, but that a zoning plan restricting the location of new adult theaters was acceptable, in part, because the overall availability of sexually explicit movies would not be significantly curtailed. "There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained." 427 U.S. at 62.

Here, too, the court has found that access to adult films and books will not be materially curtailed by the condemnation of plaintiffs' buildings. Therefore, so long as that condemnation is undertaken in pursuit of content-neutral goals, the incidental economic impact on plaintiffs does not make the Project unnecessarily suppressive of speech under *O'Brien* and *Young*.

The parties in this case have expended a great deal of energy debating the factual questions of whether plaintiffs would be able to relocate in the midtown area and what effects the City's zoning ordinance interpretation limiting multi-machine establishments would have on plaintiffs' economic viability. The court has not found it necessary to reach these questions in order to resolve this case. As plaintiffs correctly point out, if the Project condemnations amounted to a prior restraint, the ability of plaintiffs to relocate and continue their speech elsewhere would be legally irrelevant. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Schneider v. State*, 308 U.S. 147, 163 (1939). The absence of a prior restraint does not make the question any more relevant. Since the court has found that no prior restraint is being imposed in this case, and that plaintiffs are being displaced neutrally along with hundreds of other businesses, plaintiffs have no legal right to relocation.

As the court has noted above, the question of economic impact on individual purveyers is not central to the *O'Brien* inquiry either. So long as the four prongs of the O'Brien test are satisfied – as they are here since no less restrictive alternatives

are available to serve the important governmental objectives, and dozens of outlets for sexually explicit speech will remain in the area – the possibility that some condemned businesses will not be able to relocate does not undermine the constitutionality of the plan.

It is important to stress that the constitutionality of the City's zoning restricting establishments with four or more machines to Coney Island and other distant locales is not before the court. Moreover, the court does not here consider the constitutionality of the City's program of encouraging landlords to rent to other than adult uses. Defendants insist that the days of selective enforcement against adult uses are over, and that the City's code enforcement efforts now focus on prostitution, drug distribution, and other illegal uses. Nevertheless, the court shares plaintiffs' skepticism, given the City's long history of hostility towards adult uses which is reflected even in the Project's own documents. It may very well be that in seeking to "mitigate" the impact of relocation by plaintiffs and other adult uses into adjoining neighborhoods, the City will engage in a campaign of official pressure and harrasment that would constitute a prior restraint under *Bantam Books v. Sullivan*, 372 U.S. 58, 66-70 (1963) (despite absence of actual injunction, officially sanctioned threats exerted chilling effect on protected speech that amounted to prior restraint).

Although the City's actions might give rise to a cause of action by plaintiffs some time in the future, the court does not now have before it a justiciable controversy raising either the legitimacy of the City's zoning interpretation or the effects of more informal attempts to limit relocation by adult uses. If plaintiffs attempt to relocate in Midtown and are unable to do so for these reasons, these questions may become ripe. For now, however, the court is faced only with the question of the constitutionality of the Project's condemnation plan.

Similarly, the question of whether plaintiffs will be permitted to rent space in the completed Project does not present a ripe controversy. Despite the repeated statements in the Project's documents that no adult uses will remain in the Project

area, defendants now swear that no discriminatory standards will be established for renting the new stores. The anti-pornography statements are characterized as mere predictions that adult uses either will relocate somewhere else or will go out of business but, in any event, will not be able to afford to rent the desirable new space. The court has noted that it finds this line of reasoning somewhat disingenuous. However, the combination of the newly sworn and unequivocal statements of City and State officials and the fact that any controversy over access to the new Project is years away make premature any injunctive relief over this issue.

The court hopes that defendants honor their statements of neutrality, because such even-handedness towards the content of speech is constitutionally required. Although counsel for the private developer defendants have argued that a general ban on adult uses within the entire Project area would be constitutional under *Young*, the court is inclined to disagree. A blanket ban on sexually-explicit speech in stores the rental of which is controlled by the state would likely amount to an unconstitutional prior restraint.

The court does not suggest that plaintiffs have a vested right to relocate within the Project area, only that the same market forces that will determine the character of the area should be permitted to decide whether an adult bookstore is economically viable. Presumably, many modest retail operations, including coffee shops and candy stores as well as lower-volume adult uses, will be unable to pay higher rents. This is not content control. However, if plaintiffs seek to relocate in the Project area and are able to pay the going rate, they must be treated in the same manner as any other applicant. The Project's studies do not establish a direct enough connection between plaintiffs' businesses and serious conditions of blight to justify content-based discrimination in renting new space.

Just as interferance with plaintiffs attempts to relocate outside the Project area might constitute a prior restraint under *Bantam Books*, refusal to rent space in the completed City-controlled Project on a content-neutral basis, or inclusion of

restrictive clauses in City leases, might give rise to a cause of action under *Southeastern Promotions*, in which a non-obscene but sexually explicit theatrical production was denied equal access to a public auditorium. 420 U.S. at 556. Neither of these questions, however, is presented in a justiciable form by this case.

Plaintiffs further argue that if defendants really intend to permit plaintiffs to return to the Project area, then the Final Environmental Impact Statement is a meaningless document. In support of this view, plaintiffs seek to reduce the FEIS to essentially one statement: adult uses must be eliminated because they cause social blight. The court, however, has already rejected this distorted view of the Project's factual justifications. Although there are many negative statements about sex-related businesses in the FEIS, and an attempt is made to link adult uses to loitering, no where is it suggested that adult uses are the primary, much less the sole, cause of blight on Forty-Second Street. Rather, the FEIS found that blight is caused by the totality of physical and social conditions in Times Square.

The Project will eliminate the decaying buildings, diversity of ownership, underutilization, and other aspects of physical blight which the FEIS found in Times Square. It will thereby also remove much of the physical setting for prostitution, drug pushing, and other social blight which has plagued the area. In that context, it would not be unreasonable for defendants to conclude that adult bookstores could be permitted back into the Project area without a reoccurance of blight—especially since these businesses would have to survive in a significantly upscaled market.

The question of whether the City's zoning will keep plaintiffs out of the new Project area also need not be addressed here. As the court has noted, plaintiffs do not yet have a claim that the zoning has prevented them from relocating. In connection with relocation within the Project some five years down the road, there is even less reason for the court to reach out to evaluate the constitutionality of the zoning. In the intervening

years, the zoning ordinance may be amended or reinterpreted, or another court, facing a ripe controversy, may have cause to strike it down.

The case before the court involves only the condemnation of plaintiffs' buildings at the very outset of the Forty-Second Street Development Project. The court has found that the condemnation does not act as a prior restraint on protected speech and that it is not unnecessarily suppressive of speech under the Supreme Court's *O'Brien* standard. Plaintiffs have thus failed to demonstrate a likelihood of success on the merits or even substantial questions going to the merits of this case. Their motion for a preliminary injunction must therefore be denied.

The court has examined matters beyond the pleadings in making its findings of facts, and all parties have had ample opportunity to present all relevent material to the court. Defendants' motion to dismiss will therefore be treated as a motion for summary judgment pursuant to Fed. R. Civ. P. 12(b)6 and 56. The court finds that no material questions of fact remain to be determined at trial, and that defendants are entitled to judgment as a matter of law. Defendants' motion for summary judgment therefore is granted.

CONSTANCE BAKER MOTLEY
Chief Judge

Dated: New York, New York
February 5, 1985

FOOTNOTES

1. A hearing was held on plaintiffs' motion for preliminary injunction and defendants' motion to dismiss on December 12, 1984. Since both sides presented, and referred to in argument, extensive factual material beyond the complaint, and since the parties had the opportunity to present any other relevant factual material, the court will treat defendants' motion as one for summary judgment.

APPENDIX C

United States Court of Appeals
for the
Second Circuit

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 17th day of September one thousand nine hundred and eighty-five.

No. 85-7190

G. & A. BOOKS, INC., 250 BOOK CENTER, INC., COURAGEOUS BOOKS, INC., and M.J.M. EXHIBITORS, INC.,

Plaintiffs,

M.J.M. EXHIBITORS, INC.,

Plaintiff-Appellant,

v.

WILLIAM J. STERN, individually and as Chairman of the New York State Urban Development Corporation, et al.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, M.J.M. Exhibitors, Inc.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk

APPENDIX D

Rule 12(b)(6)

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56(c)

c. Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact ...

Rule 56(f)

(f) When affidavits are unavailable

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

APPENDIX E

LIST OF EXHIBITS SUBMITTED BY PETITIONER UNDER SEPARATE COVER AS PART OF ITS INITIAL OCTOBER 18, 1984 PRELIMINARY INJUNCTION MOTION.

Exhibit A-I	Identification
A	June 27, 1980 "Memorandum of Understanding" City of New York and UDC
B	February 10, 1981 "42nd Street Development Project: A Discussion Document"
C	May 1981 "42nd Street Development Project Design Guidelines"
D	June 18, 1981 "Digest of General Project Plan of Forty Second Street Development Land Use Improvement Project" (General Project Plan)
E	June 1981 "42nd Street Development Project Request for Development Proposals" (RFP)
F	June 1981 Statutory Findings Pursuant to Section 10(c)(1), (2), (3) of the UDC Act
G	June 1981 "Basis for Blight Finding" (annexed as "Exhibit B" to General Project Plan)
H	"Office of Midtown Enforcement Annual Report, January 1, 1982-December 31, 1982" (1982 OME Annual Report)
I	February 1984 "42nd Street Development Project—Draft Environmental Impact Statement" (DEIS)

Exhibits J-N	Identification
J	March 26, 1984 UDC "Times Square Development Public Hearing" Transcript (pages 1-30)
K	UDC/City "42nd Street Redevelopment Project" Pamphlet
L	August 1984 "42nd Street Development Project - Executive Summary of the Final Environmental Impact Statement" (FEIS Executive Summary)
M	August 1984 "42nd Street Development Project - Final Environmental Impact Statement (FEIS) Volume 1
N	August 1984 "42nd Street Development Project - Final Environmental Impact Statement" (FEIS) Volume 2

APPENDIX F

LIST OF RESPONDENTS' EXHIBITS ANNEXED TO THEIR NOVEMBER 21, 1984 DISTRICT COURT OPPOSITION PAPERS

Exhibits 1-F	Identification
1	Table of OME Litigation, 1980-1983 (A-134)
2	Table of OME Code Enforcement Inspections, 1980-1983 (A-135)
	Stern Affidavit
A	Sex-Related Use Establishments, 33rd-59th Streets, June 1983 (FEIS, Figure 2-15) (A-163)
B	Text of Special Message on Urban Development Program from Governor Nelson A. Rockefeller to the Legislature, dated February 27, 1968 (pages 2359-2362) (A-164-167)
C	Utilization of Development Rights - 42nd Street Development Project Area, Table 2-1 (FEIS, p. 2-8) (A-168)
D	Vacant Land - 42nd Street Development Project Area, Table 2-2 (FEIS, p. 2-9) (A-169)
E	Project Area Location (FEIS, Figure S-1) (A-170)
F	Project Area Development Sites (FEIS, Figure S-3); Project Area Site Plan (FEIS, Figure S-4); North Side Elevation of 42nd Street (FEIS, Figure S-5); South Side Elevation of 42nd Street (FEIS, Figure S-6) (A-171, 172, 173, 174)

G Public and Other Transportation Improvements (FEIS, Figure S-7); Section A-A showing Eighth Avenue Pedestrian Bridge and Lay-by-Lane (FEIS, Figure S-8); Rotunda Below Times Square (FEIS, Figure S-9); Subway Mezzanine Improvements Below Times Square (FEIS, Figure S-10); Subway Mezzanine Improvements Below Times Square With Modified Shuttle and Full Free Zone (FEIS, Figure S-11)(A-175)

APPENDIX G

PETITIONER'S EXHIBITS ANNEXED TO SCHWARZ DECEMBER 7, 1984 REPLY AFFIDAVIT (O-R) AND SUR-REPLY OF DECEMBER 27, 1984 (S).

Exhibits O-S	Identification
O	Letter dated September 8, 1975 from Director of Office of Midtown Planning and Development Dick G. Lam to Commissioner of Buildings Jeremiah T. Walsh (A-205-207)
P	Memorandum dated October 7, 1975 from Commissioner of Buildings Jeremiah T. Walsh to Borough Superintendent Dennis (A-208-209)
Q	Letter dated November 16, 1981 from Commissioner of Buildings Irwin Fruchtman to all Borough Superintendents (A-210)
R	Conditional Designation dated August 15, 1984 and Memorandum of Terms, dated August 16, 1984, between the City/UDC and Cambridge Investment Group, Ltd. (A-211-215)
S	Zoning Resolution of the City of New York, §§ 71-00 to 74-47 (A-274-277)

Supreme Court, U.S.
FILED
JAN 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1032

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

M.J.M. EXHIBITORS, INC.,

Petitioner,

-against-

WILLIAM J. STERN, individually and as Chairman of the New York State Urban Development Corporation, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel,
Attorney for Municipal-Respondents,
100 Church Street,
New York, New York 10007
(212) 566-6037

LEONARD KOERNER,*
ROBERT PFEFFER,
JUNE A. WITTERSCHEIN,
of Counsel.

(appearances cont'd)

*Counsel of Record

LEAHEY & JOHNSON, P.C.
Attorneys for Respondent
William J. Stern,
120 Wall Street,
New York, New York 10005
(212) 269-7308

ROBERT W. DAWE,*
of Counsel.

SHEA & GOULD
Attorneys for Respondents
Park Tower Realty Corp.
and George E. Klein,
330 Madison Avenue
New York, New York 10017
(212) 370-8000

DEAN G. YUZEK,*
of Counsel.

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON,
Attorneys for Respondents
Tishman Speyer Properties and
Equitable Life Assurance Society of
the United States,
345 Park Avenue
New York, New York 10154
(212) 644-8000

ARTHUR L. LIMAN*
MARTIN FLUMENBAUM,
Of Counsel.

DEMOV, MORRIS & HAMMERLING
Attorneys for Respondent
Planning Innovations, Inc.
40 West 57th Street
New York, New York 10019
(212) 757-5050

STEPHEN M. RATHKOPF*
MARSHALL H. FISHMAN,
Of Counsel.
January 29, 1986

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the District Court properly granted and the Court of Appeals properly affirmed the grant of summary judgment to respondents, where the undisputed facts, evidenced by the documents submitted by petitioner, demonstrate that the content-neutral 42nd Street Development Project, which petitioner challenges as violative of the First Amendment, serves substantial and important state interests unrelated to the suppression of free speech, and the condemnation plan achieves its purposes of, inter alia, eliminating blight and revitalizing the area economically, in a manner that is "no greater than is essential", in accordance with the holdings of this Court in United States v. Albertini, ___ US ___, 53 USLW 4844, 4848 (1985) and United States v. O'Brien, 391 US 367 (1968).

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
COUNTER-STATEMENT OF THE CASE.....	1
REASONS FOR DENYING THE WRIT....	17
PETITIONER HAS FAILED TO SET FORTH SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI TO REVIEW THE UNANIMOUS FINDINGS OF THE COURTS BELOW.....	17
CONCLUSION.....	30

TABLE OF AUTHORITIES

	Page
Cases:	
Basiardanes v. City of Galveston, 682 F2d 1203 (5th Cir., 1982).....	21
Berman v. Parker, 348 US 26 (1954).....	17, 21, 26
Clark v. Community for Creative Non-Violence, 458 US ___, 104 S Ct 3065 (1984).....	19, 25, 26
Graver Mfg. Co. v. Linde Co., 336 US 271 (1949), aff'd, 339 US 605 (1950).....	17
Hawaii Housing Authority v. Midkiff, ___ US ___, 104 S Ct 2321 (1984).....	21
Heffron v. International Society for Krishna Consciousness, 452 US 640 (1981).....	15
Keego Harbor Co. v. City of Keego Harbor, 657 F2d 94 (6th Cir., 1981).....	21
Members of City Council v. Vincent, ___ US ___, 104 S Ct 2118 (1984).....	19, 22
Playtime Theatres Inc. v. City of Renton, 748 F2d 527 (9th Cir., 1984), jur. noted, 105 S Ct 2015 (1985), app. pndg., ___ US ___.....	13, 27

Romero v. International Terminal Operating Co., 358 US 354 (1959)..... 29

Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corp., 771 F2d 44 (2d Cir., 1985), pet. for. cert. filed, 54 USLW 3485 (Jan. 3, 1986)..... 9

Schad v. Borough of Mount Ephraim, 452 US 61 (1981)..... 20, 22

Star Satellite, Inc. v. City of Biloxi, ___ F2d ___ (5th Cir., Jan. 3, 1986)..... 27

United States v. Albertini, ___ US ___, 53 USLW 4844 (1985)..... 13, 19, 24, 25, 28

United States v. O'Brien, 391 US 367 (1968)..... 11, 13, 18, 19, 20, 21, 22, 23, 24, 28

Young v. American Mini Theatres, 427 US 50 (1976)..... 11, 13, 20, 21, 24, 25

Constitutional Provisions and Statutes:

United States Constitution,
First Amendment..... passim
Fourteenth Amendment..... 9

Federal Rules Civil Procedure,
Rule 12..... 30
Rule 56..... 15, 30

No. 85-1032

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

M.J.M. EXHIBITORS, INC.,

Petitioner,

-against-

WILLIAM J. STERN, individually and as Chairman of the New York State Urban Development Corporation, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTER-STATEMENT OF THE CASE

This brief is submitted on behalf of respondents,* state and municipal officials, the City

---

*Those respondents are:

WILLIAM J. STERN, individually and as Chairman of the New York State Urban Development

(footnote cont'd on next page)

of New York, and three private developers of the 42nd Street Development Project ("the Project"), to urge denial of a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. Petitioner, the owner of one of 406 businesses in the Project area, seeks review of a Second Circuit determination which upheld the grant of summary judgment to respondents and denied the application to enjoin the Project. The lower courts unanimously found that since the 42nd Street Development Project achieves, in a manner that is no greater than essential, important and

---

* (footnote from previous page)

Corporation, WILLIAM H. DALY, individually and as Director of the Office of Midtown Enforcement of the City of New York, STEVEN SPINOLA, individually and as President of the Public Development Corporation of the City of New York, HERBERT J. STURZ, individually and as Chairman of the City Planning Commission of the City of New York, EDWARD I. KOCH, individually and as Mayor of the City of New York, THE CITY OF NEW YORK, PARK TOWER REALTY CORP., TISHMAN SPEYER PROPERTIES, EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES and PLANNING INNOVATIONS, INC. The Rule 28.1 Statement appears in Respondents' Appendix.

substantial state interests, unrelated to the suppression of speech, such as the elimination of blight in this crime-ridden, economically under-utilized area, the condemnation plan does not violate the First Amendment.

A. Procedural History of the Project

The 42nd Street/Times Square area is well-known as the heart of the City's theater district and the hub of its transit network (A148-A152).* The history of the Times Square area reveals, however, that its character changed drastically throughout the years from a vital, developing region into what in 1960 was reported to be "the worst block in town"** (A151). Although efforts had been made by

*Unless otherwise indicated, numbers in parentheses preceded by the letter "A" are references to pages in the Joint Appendix submitted to the Second Circuit Court of Appeals. Numbers preceded by the letters "App" are references to the Appendix to the Petition.

**Even petitioner concedes that its business is located in an area blighted by, among other things, street crime and loitering (A245-246).

both private and public entities to revitalize the area, none came to fruition (A121, 152, App 31).

In an attempt to reverse these failed efforts, on June 27, 1980, Mayor Koch and the President of the New York State Urban Development Corporation ("UDC") entered into a Memorandum of Understanding, in which UDC and the City agreed to collaborate in the planning and redevelopment of the 42nd Street/Times Square area (A121, App 4, App 31). To implement the Plan, where necessary, UDC would acquire through condemnation the property needed to effectuate the Project (A123, 153, App 9).* The Project plan requires private investment of upwards of 1.6 billion dollars (A139).

A draft environmental impact statement was prepared and public hearings commenced (A122, App 5, App 31). The final environmental impact

*The Project area encompasses 13 acres and includes the entire blocks between Broadway and Eighth Avenue from 41st to 43rd Streets as well as additional properties on Eighth Avenue south to 40th Street. See A163.

statement (FEIS),* was completed toward the end of the summer, and the requisite hearings concluded on September 6, 1984 (A12, App 5, App 31-32). Thereafter, UDC's Directors and the New York City Board of Estimate approved the Project (A123, 158, App 5, App 32).

B. Substantive Findings of Blight and Resulting Plans for Development

As both the District Court and Court of Appeals found, numerous conditions contribute to the blight in the Project area. A number of buildings are deteriorated and empty above the first floor (A123, FEIS 2-7), and even though this central area of Manhattan is zoned for the highest density, 72% of the area's development rights are not used and 18% of what is developed is unoccupied (A123, 153,

*The two volume FEIS, which the Circuit termed "the primary document setting forth the factual basis for the Project" (App 5), was submitted by petitioner as Exhibits M and N in support of the motion for a preliminary injunction. Citations to the document are "FEIS", followed by the relevant page numbers.

FEIS 2-13, App 6-7, App 33).

As a result, tax revenues from the area are low (FEIS S-8, A160, App 7). In addition, 42nd Street between Seventh and Eighth Avenues has been among the most crime-ridden areas in the city, having seen a 53% increase in reported crimes from 1978 to 1980 (App 6, App 34, FEIS 2-81 - 2-89), with the subway stations regularly ranking number one and two in reported felony and misdemeanor complaints (App 6, FEIS 2-89 - 2-90).

These blighted conditions on and near 42nd Street demanded a comprehensive, well-integrated program to reverse the decline of the Project area. Thus, to eliminate the core of blight that has discouraged new investment for over half a century, the following goals were established for the Project:

> First, to eliminate the blight and physical decay, as well as the crime and frightening street life, that now characterizes the West 42nd Street area;
>
> Second, to preserve and restore the area's extraordinary older theaters for theatrical and upgraded movie

use, and, by so doing, to revitalize the project area as a theater and entertainment center serving tourists and all New Yorkers;

Third, to develop the project area's commercial and retail potential to produce a lively, healthy street ambience and to support the City's policy (as expressed in the new Midtown Zoning) that encourages the movement of Midtown office construction westward;

Fourth, to help upgrade public facilities in the project area, particularly the Times Square subway station;

Fifth, to increase the project area's economic contribution to the City as a whole, both through increased revenues to the City and expanded private investment and employment opportunities; and

Sixth, to restore the project area's role as a positive influence on the adjacent communities, notably the theater district, the garment center, and the Clinton residential neighborhood, and as a productive link among these communities and the expanding midtown office district (App 7-8, FEIS, S-3).

To achieve these goals, the following physical components of the Project were planned: (1) four office towers; (2) a Trade Mart; (3) a hotel with

retail space; (4) restoration of the nine landmark theaters (A124, FEIS S-4 - S-6, App 8). An integral part of the plan includes public improvements which would significantly upgrade the existing transportation network and the aesthetic and urban design quality of the Project area.

It is undisputed that aside from the physical and visual benefits to be realized from the elimination of blight and new construction, the Project will also yield significant economic benefits. In essence, the plan will spawn a transformation in that it will trigger new development, spur economic growth, provide new job opportunities, restore the architecturally significant theaters, and improve public facilities (A125, FEIS S-13, App 9, App 33).

C. Procedural History of this Action

Petitioner MJM, and three other businesses selling either sexually explicit books or 8 mm. films through coin-operated machines, commenced this action in October, 1984. Shortly thereafter, the parties filed an application, by order to show cause,

for (1) a preliminary injunction enjoining implementation of the Project; (2) a declaratory judgment that the Project violates their rights under the First and Fourteenth Amendments; and (3) such other relief as the court deemed appropriate (A5-70). In support of their application and as part of their reply, the moving parties submitted many documents describing the Project and upon which the Project approvals were based, including the FEIS and detailed factual affidavits (A68-69, 190-221).

Respondents moved to dismiss on several grounds, including failure to state a claim and the abstention doctrine.* In their papers, the governmental respondents specifically denied petitioner's allegation that adult uses would be singled out for exclusion from the Project Area

*This action is one of approximately twenty-five state and federal lawsuits challenging the Project. To date, every case reaching resolution has upheld the validity of the Project, and sustained the public purpose. See e.g., Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corporation, 771 F2d 44 (2d Cir., 1985), pet. for cert. filed, 54 USLW 3485 (Jan. 3, 1986).

after redevelopment, and affirmatively stated that leases with developers would contain no discriminatory use restrictions on petitioner's retail establishments (A120, 138-139). Moreover, it was demonstrated that there are myriad sex related use establishments totally unaffected by the Project (A140-141, A163).

After oral argument on the applications in December, 1984, the District Court allowed counsel for petitioner to submit additional factual papers regarding its relocation problems and the City's zoning regulations (A270-277). On February 5, 1985, the District Court rendered its opinion granting respondents summary judgment and dismissing the complaint. Petitioner's application for reargument was denied on March 1, 1985.

1. The District Court Opinion

In extensive findings of fact (generally summarized supra at 3-8), most of which are not disputed, the District Court found that the Project area is crime-ridden and plagued by physical, social

and economic blight (App 31-35) which public and private ventures have failed to eradicate. The court was unable to conclude that "adult uses will be banned from the completed Project" (id.). The court rejected petitioner's argument that elimination of such uses was the primary motivation of the Project, since "it strains credibility to assert that the City and State would undertake such a massive project, involving investment of more than $1.6 billion, and displacing more than 400 businesses, in order to rid Times Square of a handful of pornographic book stores and a few adult theatres" (App. 37). Rather, applying the test articulated by this Court in Young v. American Mini Theatres, 427 US 50 (1976) and United States v. O'Brien, 391 US 367 (1968), the District Court held that the substantial and important state interests of eliminating physical and social blight, revitalizing under-utilized property and preserving historic theaters, were unrelated to the suppression of free speech and thus, the Project did not violate petitioner's rights (App 38-53).

2. The Second Circuit Opinion

The Court of Appeals unanimously concurred in the District Court findings "that the proposed condemnation . . . plan did not classify speech on the basis of content, or burden it with overly restrictive regulations . . . ." (App 3). The court noted its agreement with the District Court that petitioner's activities have not been singled out for special treatment, and rejected petitioner's statistical analysis, also urged in the Petition, regarding the effect the Project would have in closing sex related uses (App 16). The court noted that "[p]laintiffs' businesses constitute only 1% of the total number of businesses to be displaced [and] [s]ex related establishments . . . represent only 5% of all businesses displaced and 3.2% of the total gross footage to be acquired." Id.

Having found that the Project did not constitute a prior restraint since it is content-neutral, the Circuit next considered whether any alleged incidental impact on speech was justified.

Id. The Second Circuit applied the four-part test adopted by this Court in United States v. O'Brien, 391 US 369 (1968), as applied by Justice Powell in Young, supra 427 US at 79-80, and, most recently by this Court in United States v. Albertini, ___ US ___, 53 USLW 4844, 4847 (1985). Thus, the Second Circuit concluded that the "substantial governmental interests which the Project is designed to serve are unrelated to ["and independent of" (App 19)] suppression of free speech." (App 18). The court held, applying the reasoning of this Court in O'Brien, that the "subjective motivation . . . of some proponents of the Project to suppress sex-related businesses does not render it unconstitutional . . . . " (App 19). The court distinguished the Ninth Circuit opinion in Playtime Theatres Inc. v. City of Renton, 748 F2d 527 (9th Cir., 1984), jur. noted, 105 S Ct 2015 (1985), app. pndg., argued November 12, 1985, upon which petitioner relies (Petition, pps. 12-13), noting that, unlike this case, the challenged regulation in Playtime Theatres was content-based and the record

was inadequate to determine if there were substantial reasons unrelated to the suppression of speech for the adult theater zoning regulation (App 19).

The Court of Appeals held that the "city and UDC acted within the bounds of the Constitution in concluding that the use of eminent domain power would be a more effective means of achieving the Project's goals" (App 20) than the police sweeps recommended by petitioner. The court agreed with the District Court that "a substantially less restrictive plan [than that of the Project] could not be expected to fulfill the goals of the Project" (App 20), and found no basis to substitute its judgment for that of the responsible officials (App 21). Finally, on the merits, the court agreed "with the district court that 'the general availability of sexually explicit material in the midtown area will not be severely curtailed . . . because several dozen adult uses will remain within a few blocks of the Project area.'" (App 21). Moreover, the court did not agree with petitioner that it would be prevented from

effectively relocating by New York City zoning "which provides that establishments with four or more coin-operated amusement devices may locate [as of right] only in areas zoned for amusement arcades" (App 23). The court held that "the Constitution does not entitle a person to distribution of information in precisely the same form as that in use by the least expensive means of expression, as long as a comparable method is available" citing inter alia, Heffron v. International Society for Krishna Consciousness, Inc., 452 US 640, 647 (1981), and found that petitioner has readily available "numerous ... unrestricted means of exhibition purveying the same information" (App 23).

The court also rejected petitioner's procedural argument regarding the conversion of the motions into ones for summary judgment, without strict compliance with Federal Rule of Civil Procedure ("FRCP") 56. The court found that the "essential inquiry is whether the appellant should have reasonably recognized the possibility . . . [of conversion] or was taken by surprise and deprived of

a reasonable opportunity to meet facts outside the pleadings." (App 13). Recognizing that each case will turn on its own facts, the court held that petitioner had ample opportunity to, and did in fact, submit voluminous factual material outside the pleadings. Thus, petitioner could not claim surprise or lack of notice of the conversion (App 15). Accordingly, the Second Circuit affirmed the denial of the preliminary injunction and dismissal of the complaint.

REASONS FOR DENYING THE WRIT

PETITIONER HAS FAILED TO SET FORTH SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI TO REVIEW THE UNANIMOUS FINDINGS OF THE COURTS BELOW.

Petitioner's request for a writ necessarily misstates the Record* and the findings of the courts below** in an attempt to create a constitutional violation which would merit review by this Court. However, a review of the lower courts'

*For example, petitioner states that the government "order[ed] that legitimate stores replace adult uses" but cannot point to any evidence of a government official having done so. Indeed, as found by the courts below, the government "denied that any arbitrary use restrictions would be imposed to prevent plaintiffs from relocating in the retail establishments in the Project area...." (App 10, App 37). Most of petitioner's arguments rest upon a different reading of the facts than that of the courts below. Petitions for certiorari, however, are not granted to review concurrent factual findings of the lower courts. See Graver Mfg. Co. v. Linde Co., 336 US 271, 275 (1949), aff'd, 339 US 605, 609-610 (1950).

**A reading of the decisions below demonstrates that the courts' analysis went far beyond the Berman v. Parker, 348 US 26 (1954) "police power due process rationally related test." (Petition, p. 10).

decisions reveals that, upon careful consideration of all relevent factual material and application of the tests articulated by this Court on comparable First Amendment challenges, the lower courts properly determined that the Project serves substantial state interests and does not violate petitioner's rights. Petitioner, very simply, can point to no conflict or novel and important question raised by the lower courts' dismissal of its First Amendment challenge which warrants review by this Court.

A. The District and Circuit Courts Properly Applied the Young/O'Brien Test.

In United States v. O'Brien, 391 US 367, 376-377 (1968) this Court held that when a government regulation is challenged as violating the First Amendment, incidental limitations the regulation may impose can be justified if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the

incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 US at 377.

This test has been consistently applied in various contexts where there is an alleged incidental burden* on free expression caused by government action. See United States v. Albertini, __ US ___, 53 USLW 4844, 4847-4848 (1985); Clark v. Community for Creative Non-Violence, 468 US ___, 104 S Ct 3065, 3069-3072 (1984); Members of City Council v.

*Petitioner's attempt to categorize the Project as more than an incidental burden cannot be justified under any reading of the facts, and, indeed, was rejected by both courts below in granting summary judgment (App 21-23, App 48). Despite petitioner's diminution argument, there simply will not be any significant curtailment in MJM's ability to purvey its message, nor in the public's access to view sexually explicit films. Id. Moreover, petitioner's argument that New York City zoning prevents relocation is not only irrelevant, it is wrong. The sole restriction in New York City zoning is that any business with more than four coin operated machines, (such as pinball, video, or peep machines) can only locate as of right in areas zoned for amusement arcades. However, petitioner can relocate in most commercial districts throughout the city if there is a maximum of four coin-operated machines on the premises.

Vincent, ___ US ___, 104 S Ct 2118, 2129-2132 (1984); Young v. American Mini Theatres, 427 US 50, 73-84 (1976) (Justice Powell concurring). Accordingly, the O'Brien test, as synthesized by Justice Powell in Young, which upheld a content-based amendment to a Detroit zoning ordinance restricting the location of adult movie theaters, is the appropriate analysis to be applied to petitioner's claim.*

It is clear that the courts below correctly applied the Young/O'Brien test to the undisputed facts in determining that petitioner's rights have not

*This Court has rejected application of the Young/O'Brien test when the government specifically imposes a total or near total ban on a broad category of protected activity, [Schad v. Borough of Mount Ephraim, 452 US 61, 71-72 (1981)], which was not the case in Young. Nor is it this case. Here, sex related uses constitute only 5% of the businesses being condemned and the "general availability of sexually explicit material . . . will not be severely curtailed" (App 21). Thus, petitioner's assertion (Petition, pps. 49, 9-10) that the Second Circuit improperly ignored Schad (and the cases which follow it, see infra, p. 28) is without merit; here, judicial deference to the State's substantial interest in eliminating blight was clearly appropriate.

been violated. With respect to the first and second O'Brien criteria, there is no question that the condemnation plan is within the constitutional powers of the governmental respondents. Hawaii Housing Authority v. Midkiff, ___ US ___, 104 S Ct 2321 (1984); Berman v. Parker, 348 US 26 (1954). Nor is there any question that the Project will further the important and substantial governmental interests of (1) eliminating blight, (2) redeveloping a severely underutilized area, and (3) preserving theaters of architectural and historical significance.* Young, supra, 427 US at 71 ("the city's interest in attempting to preserve the quality of urban life must be accorded high respect.");

*The findings of blight and underutilization in the Project area are the results of substantially documented studies, carried out over a number of years, which are referenced in the FEIS. Thus, this case is not like those cited by petitioner at page 10, where the court was dealing with an "empty" record to support the proposed governmental interests [Basiardanes v. City of Galveston, 682 F2d 1203, 1215 (5th Cir., 1982)]; or with post hoc justifications for the proposed governmental interests, [Keego Harbor Co. v. City of Keego Harbor, 657 F2d 94, 98 (6th Cir., 1981)].

Members of City Council v. Taxpayers for Vincent, ___ US ___, 104 S Ct 2118, 2129 (1984) ("the state may legitimately exercise its police powers to advance esthetic values."). The Project will attack those problems by new office construction, by improving the subway system and stations, and by restoring historic theaters to their original grandeur. Thus, the Project will bring to fruition the stated goals of revitalizing Times Square by bringing thousands of office workers, shoppers, and theater patrons back into the neighborhood, while at the same time significantly increasing the area's tax base.

The third O'Brien standard is met since these goals are clearly unrelated to the suppression of free expression. The Project plan, neither on its face nor in operation, puts adult uses out of business on the basis of the content of the material they purvey. See contra, Schad v. Borough of Mount Ephraim, 452 US 61 (1981) (where all live entertainment was banned from the entire borough without sufficient state interests justifying the ban).

BEST AVAILABLE COPY

Indeed, 406 businesses will be condemned to achieve these important and substantial interests. The fact that as a result of the Project less than 5% of the businesses within a few block area of the City which engage in activities protected by the First Amendment are also subject to displacement does not alter this result, even though the District Court found some evidence of hostility toward adult uses.

In O'Brien, supra, 391 US at 387, this Court upheld a statute prohibiting destruction of draft registration certificates on the ground that Congress had a substantial interest in their continuing availability. The Court reached this result even though there was evidence in the legislative record regarding "defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy." Id. Having found a substantial basis for the statute, the Court simply refused to inquire into legislative motives or purposes, finding such to be a "hazardous matter." Id. at 383.

Similarly, in Young, Justice Powell found the content-based amendment justified because the legislature's well-documented interest of protecting the commercial districts from the deterioration engendered by the concentration of regulated uses, was unrelated to the suppression of free expression. 427 US at 80-81. This conclusion was reached even in the face of some evidence that the amendment was in response to the significant growth in the number of adult theaters in Detroit, which in five years had grown from 2 to 25. 427 US at 54-55. In light of this Court's rulings in O'Brien and Young, even in the face of the finding of hostility to adult uses, it is clear that the lower courts properly concluded that there are substantial state interests unrelated to the suppression of free expression which justify any incidental burden on petitioner's exercise of its First Amendment rights.

Finally, the last part of the O'Brien test is met since the condemnation plan is "no greater than is essential" and would be achieved much "less effectively" by implementing the police sweeps

suggested by petitioner. See United States v. Albertini, supra, 53 USLW at 4848. The government respondents have determined that the area can only be renewed through a wholesale approach to the problem, i.e., condemnation. This finding is entitled to great deference. Clark v. Community for Creative Non-Violence, supra, 104 S Ct 3065; Young v. American Mini Theatres, supra, 427 US 50. It is unchallenged that numerous plans to revitalize the Times Square area have failed (A152, FEIS 1-1). Although a few sites surrounding the Project area have been developed by private industries in recent years, because of the extensive blight in the Project area, as well as the diversity of ownership, the area has not been attractive to independent, private development (A153-154). The broad purposes of the Project simply could not be achieved by police sweeps, as petitioner suggests, because, as the District Court found, that course focusses only upon one of the many factors that contributes to the blight, and with limited success at that (App 48).

BEST AVAILABLE COPY

Moreover, these alternatives need not be considered because it has been held that when dealing with the exercise of the sovereign right of eminent domain:

> It is not for the courts to oversee the choice of the boundary line or to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and the character of the land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.*

Berman v. Parker, 348 US 26, 35-36 (1954). See also Clark v. Community for Creative Non-Violence, supra, 104 S Ct 3065, 3072 (deference to Park Service as to "how much protection of parklands is wise and how that level of conservation is to be

*Thus, petitioner's argument that the documents do not demonstrate a connection between M.J.M.'s business and the findings of blight, is not controlling. It cannot be gainsaid, and indeed petitioner has admitted, that the entire block upon which its business is located is blighted (A245-246), and piecemeal condemnation will not achieve the Project's goals.

attained.") Thus, the 42nd Street Development Project passes muster under the strictures of the Young/O'Brien test.

Petitioner's plea for a writ cites numerous cases where the courts, applying the Young/O'Brien test, have struck down the challenged regulation. However, it is clear that the contrary results in the cited cases are caused not by a conflict in the legal analysis applied, but rather, by the factual record (or lack thereof) in support of the stated legislative interests, or, by the overly restrictive impact the regulation might have (such as a total or a near total ban) upon the First Amendment uses. See Playtime Theaters, Inc. v. City of Renton, 748 F2d 527 (9th Cir., 1984), app. pndg., ___ US ___; compare Star Satellite, Inc. v. City of Biloxi, ___ F2d ___ (5th Cir., Jan. 3, 1986) (upholding adult use zoning restriction under Young/O'Brien analysis). Petitioner's citations at page 16 in support of its claim that virtually every "retroactive zoning regulation," except the one at bar, has been struck down, are inapposite; the 42nd Street Development

BEST AVAILABLE COPY

Project is a condemnation plan and not a "retroactively applied zoning regulation." Thus, the purported need for clarification does not exist; the courts below properly determined under clearly established First Amendment principles that petitioner's rights have not been violated.

B. The Second Circuit Decision, Affirming the Grant of Summary Judgment, Does Not Merit Review By This Court.

In affirming the grant of summary judgment, the Second Circuit held that under these facts, the District Court's failure to expressly notify the parties of its intent to treat the motion as one for summary judgment, did not warrant a remand* to

*Indeed, a remand in this case would serve no purpose since there is no other factual material petitioner could possibly submit which would affect the outcome of its claim. Petitioner's argument that if given an opportunity for discovery, it might be shown that the "City deliberately did not use the proven successful measure of police sweeps in the Project area in order to justify condemnation" (Petition, p. 18) is of no consequence. The courts below found that police sweeps would be less effective than the condemnation plan, and thus, are not required by this Court's holding in O'Brien. See App 20, citing, US v. Albertini, ___ US ___, 53 USLW at 4848; App 48.

comply with the technical requirement of notice. The court held that a "party cannot complain of lack of a reasonable opportunity to present all material relevant to a motion for summary judgment when both parties have filed exhibits, affidavits, counter-affidavits, depositions, etc. in support of and opposition to a motion to dismiss" (App 14, citation omitted). In effect, the Circuit held, and properly so, that petitioner had notice of and indeed, caused the conversion to summary judgment, in light of the extensive factual materials (including the FEIS and factual affidavits) submitted by petitioner and its co-plaintiffs. Thus, the result in this case is not in square conflict with the decisions in other circuits (see Petition, p. 19) where the courts have held that a remand is necessary in order to avoid surprise and afford a party a reasonable opportunity to present all available material which would demonstrate a genuine issue of material fact. Since petitioner has had that opportunity, treatment of the motion as one for summary judgment was appropriate. Cf. Romero v. International Terminal Operating Co.,

358 US 354, 357, n.4 (1959).

To the extent it can be argued that a conflict exists on the question whether FRCP 12 and 56 require technical compliance, as opposed to substantial compliance, with the notice provision, that is not an issue which merits review by this Court, particularly on the undisputed facts in this case.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

January 29, 1986.

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel,
Attorney for Municipal-Respondents,
100 Church Street,
New York, New York 10007
(212) 566-6037

LEONARD KOERNER,*
ROBERT PFEFFER,
JUNE A. WITTERSCHEIN,
of Counsel.

(appearances cont'd)

*Counsel of Record.

LEAHEY & JOHNSON, P.C.
Attorneys for Respondent
William J Stern,
120 Wall Street,
New York, New York 10005
(212) 269-7308

ROBERT W. DAWE *
of Counsel.

SHEA & GOULD
Attorneys for Respondents
Park Tower Realty Corp.
and George E. Klein,
330 Madison Avenue
New York, New York 10017
(212) 370-8000

DEAN G. YUZEK,*
of Counsel.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON,
Attorneys for Respondents
Tishman Speyer Properties and
Equitable Life Assurance Society of
the United States,
345 Park Avenue
New York, New York 10154
(212) 644-8000

ARTHUR L. LIMAN*
MARTIN FLUMENBAUM,
Of Counsel.

DEMOV, MORRIS & HAMMERLING
Attorneys for Respondent
Planning Innovations, Inc.
40 West 57th Street
New York, New York 10019
(212) 757-5050

STEPHEN M. RATHKOPF*
MARSHALL H. FISHMAN,
Of Counsel.
January 29, 1986

Supreme Court, U.S.
FILED
FEB 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1032

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

M.J.M. EXHIBITORS, INC.,

Petitioner,

-against-

WILLIAM J. STERN, individually and as Chairman of the New York State Urban Development Corporation, et al.,

Respondents.

RESPONDENTS' APPENDIX

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel,
Attorney for Municipal-Respondents,
100 Church Street,
New York, New York 10007
(212) 566-6037

LEONARD KOERNER,*
ROBERT PFEFFER,
JUNE A. WITTERSCHEIN,
of Counsel.

(appearances cont'd)

*Counsel of Record

LEAHEY & JOHNSON, P.C.
Attorneys for Respondent
William J. Stern,
120 Wall Street,
New York, New York 10005
(212) 269-7308

ROBERT W. DAWE,*
of Counsel.

SHEA & GOULD
Attorneys for Respondents
Park Tower Realty Corp.
and George E. Klein,
330 Madison Avenue
New York, New York 10017
(212) 370-8000

DEAN G. YUZEK,*
of Counsel.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON,
Attorneys for Respondents
Tishman Speyer Properties and
Equitable Life Assurance Society of
the United States,
345 Park Avenue
New York, New York 10154
(212) 644-8000

ARTHUR L. LIMAN,*
MARTIN FLUMENBAUM,
of Counsel.

DEMOV MORRIS & HAMMERLING,
Attorneys for Respondent
Planning Innovations, Inc.
40 West 57th Street
New York, New York 10019
(212) 757-5050

STEPHEN M. RATHKOPF,*
MARSHALL FISHMAN,
of Counsel.

STATEMENTS PURSUANT TO RULE 28.1

Pursuant to Rule 28.1 of this Court Respondent The Equitable Life Assu ance Society of the United States states that the following list identifies all of its parent companies, subsidiaries and affiliates

Tandem Financial Group, Inc.

Pursuant to Rule 28.1 of this Court Respondent Tishman Speyer Properties states that the following list identifies all of its parent companies, subsidiaries and affiliates:

Belcaster (Delman) Service Corporation
Belcaster Service Corporation
Chazen (Delman) Service Corporation
Chazen Service Corporation
Speyer (Delman) Service Corporation
Speyer (North Carolina) Service Corporation
Speyer Service Corporation
Svoboda (Delman) Service Corporation
Svoboda Service Corporation
Tishman (Delman) Service Corporation
Tishman Liquidating Corporation (Formerly TRCC)
Tishman (North Carolina) Service Corporation
Tishman Service Corporation
Tishman Speyer Development Corporation
Tishman Speyer Properties, Inc.
TS Service Corporation

Pursuant to Rule 28.1 of this Court Respondent Planning Innovations, Inc. states that the following list identifies all of its parent companies, subsidiaries and affiliates:

RPA Innovations, Inc.
Park A Innovations, L.P.
RPA Associates
RPL Innovations, Inc.
Place L Innovations, L.P.
RPL Associates

No. 85-1032

Supreme Court, U.S.
FILED
FEB 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

M.J.M. EXHIBITORS, INC.,

Petitioner,

– against –

WILLIAM J. STERN, individually and as Chairman of the New York State Urban Development Corporation, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

RALPH J. SCHWARZ, JR.
Attorney for Petitioner
122 East 42nd Street
Suite 2117
New York, New York 10168
(212) 867-8850

Of Counsel:
RALPH J. SCHWARZ, JR.
KEITH N. COSTA
STEWART STONE

February 6, 1986

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
DIMINUTION OF PUBLIC ACCESS: QUESTION #3.....	2
MOTIVE AND EQUAL PROTECTION: QUESTION #2.....	5
NO CONTRIBUTION TO BLIGHT; DUE PROCESS NOT APPLICABLE: QUESTION #1.....	12
LEAST DRASTIC MEANS AND SUMMARY JUDGMENT CONVERSION WITHOUT NOTICE: QUESTIONS: #4 AND #5.....	15
CONCLUSION.....	19

TABLE OF AUTHORITIES

A. Cases

	Page
Basiardanes v. City of Galveston, 682 F.2d 1203 (CA 5 1982).....	12
Berman v. Parker, 348 U.S. 26 (1954).....	5, 14
Bose Corp. v. Consumers Union of United States, Inc., ____ U.S. ____, 80 L.Ed.2d 502, 104 S.Ct. 1949 (1984).....	12
City of Renton v. Playtime Theaters, Inc., jur. noted, No. 84-1360, 85 L.Ed.2d 297 (1985), app. pndg., ____ U.S. ____.....	6
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949), aff'd., 339 U.S. 605 (1950).....	6, 11
Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527 (CA 9 1984).....	5, 6
Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959).....	17
Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).....	9, 14

United States v. O'Brien, 391 U.S. 367 (1968)..... 9, 10, 15

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)... 5, 6

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)..... 5, 9-11, 13-15

B. Other Authorities

United States Constitution,

First Amendment..... passim

Fourteenth Amendment..... passim

Federal Rules of Civil Procedure,

Rule 12(b)(6)..... 16

Rule 56..... 16, 17

United States District Court for the Southern District of New York Civil Rule 3(g)..... 18

No. 85-1032

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

M.J.M. EXHIBITORS, INC.,

Petitioner,

-against-

WILLIAM J. STERN, individually and as Chairman of the New York State Urban Development Corporation, et al.,

Respondents.

PETITIONER'S REPLY BRIEF

The respondents' very competent counsel skillfully obliterate the Second Circuit holdings and issues with arguments having little to do with the petition.

Diminution of Public Access: Question #3

The Project will retroactively destroy 65% to 70% of all adult peep machine 8 mm. film exhibition in the City. City zoning makes relocation impossible. The Second Circuit held there was no substantial diminution of public access. It ruled that the court should not "distinquish between the specific types of use *** [but must] consider them collectively," that petitioner was engaged in "use-fragmentization [not] constitutionally mandated," and that 8 mm. film exhibition was the same as "adult movies, topless bars, swingers' clubs, ***" as well as "*** books, magazines, movies, video cassettes and live shows purveying the same

information" (App-22-23).[1]

Intending no disrespect, we submit there is no First Amendment basis whatsoever for this preposterous proposition. Understandably then, respondents don't address that issue but bury it.

Respondents claim that the Circuit Court "rejected petitioner's statistical analysis ***" and noted that "[s]ex-related establishments represent *** only 5% of all businesses" to be displaced. Respondents then urge the fact that "City zoning prevents relocation" is supposedly irrelevant because petitioner can relocate with less than five machines, and that retroactive destruction is immaterial because the Project involves condemnation and not a

---

1 "App" is the designation of the opinions reproduced in the petition appendix. Any numbers preceded by "A" refer to the Second Circuit joint appendix.

"'retroactively applied zoning regulation'" (Res.Br. pp. 12, 19 n.*, 20 n.*, 23, 27 and 28).

Most of the foregoing has no relevance to this question. The Second Circuit holding was not predicated on the rejection of any statistical analysis or the possibility of relocation with only four machines.[2] Its diminution of access reasoning presents the issue of whether the right to visit a topless bar, etc. or the right to purchase adult books, etc. can all be equated with the right to view an 8 mm. adult film for 45-55 seconds for 25 cents? The answer

---

2 As a matter of fact the reduction to four machines alters the percentage of permanent elimination only in the most miniscule fashion. Further, neither petitioner nor any other adult store can economically survive in any location with only four machines. Thus petitioner presently has approximately 115 machines. The suggestion that petitioner or any other store with peep shows could survive with only four machines is absurd.

should be obvious.

The need for review is emphasized by respondents' claim that the Young[3] progeny condemning zoning retroactive destruction have no application because this "Project is a condemnation plan" (Res.Br. pp. 27, 28). What respondents really urge is that with condemnation, diminution of public access is to be determined not by the First Amendment rationale of the Second Circuit, but under the Berman v. Parker, 348 U.S. 26 (1954), due process rationally related test. Review of Question #3 is clearly merited.

Motive and Equal Protection:
Question #2

Respondents obscure the mixed motive issue presented by Playtime Theaters, Inc. and Village of Arlington

3 Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

Heights and the intertwined First Amendment and Equal Protection clause questions. They also rely on Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949), aff'd., 339 U.S. 605 (1950).

Respondents assert the district court "rejected petitioner's argument that elimination of [adult uses] was the primary motivation of the Project" (Res.Br. p. 11), omitting the district court's underscoring of the words "primary motivation" (App-37, emphasis that of the district court). Petitioner never urged and need not show that elimination of adult uses was the primary motive. The district court was ruling on a point petitioner did not make.

---

4 Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527 at 537 (CA 9 1984), jur. noted, 85 L.Ed.2d 297, No. 84-1360, argued November 12, 1985; Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 at 265-266 (1977).

No matter how legitimate and predominant the goals of new office buildings, subway renovation, crime elimination, etc. may be, nonetheless the fact remains that one (not the only, but one) of the Project purposes is the permanent replacement of adult uses with legitimate tenants.

The 1980 Memorandum of Understanding between the City and UDC was entered into to eliminate not only physical and social blight but <u>also</u> "undesirable uses" (App-4, A-16).

While fast food restaurants and liquor stores contribute to blight, nonetheless the FEIS states specifically that "<u>there will be no action or pornographic movies, sex-related establishments</u> ***." However, the FEIS simultaneously proclaims that the Project will contain fast food restaurants and liquor stores (FEIS pp. 2-94, 2-95,

emphasis supplied). In short, only speech uses are permanently replaced for blight they do not cause.

When the Project states that blight rehabilitation cannot be achieved without the permanent replacement of only speech uses and there is official hostility, this is not merely a "subjective motivation" of some Project proponents to eliminate speech and the Project goals are not unrelated to speech suppression, as the Second Circuit held (App-19). Such proclamations are part of the official policy even though speech destruction may not be the primary motivation.[5]

---

5 In addition to the FEIS, the record summarized in the petition shows endless government pronouncements such as those of Governor Cuomo that the Project goals include the permanent replacement of sex uses by "desirable" or "positive" tenants. Post-litigation affidavits of no intent to discriminate cannot eradiate all of these statements or alter the basic underpinning of the FEIS that speech uses must be permanently replaced to achieve rehabilitation.

Respondents cite Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981), and note that 406 businesses will be replaced and that adult uses are also subject to displacement (Res.Br. pp. 22, 23). Reading the respondents' brief one would believe that under Schad unless there is a total ban of adult First Amendment activities then there are never any viable issues of mixed motive, whether state action is unrelated to speech suppression, or whether speech uses are impermissibly being singled out. That is just not so.

Finally respondents, citing O'Brien[6] and Young, claim that motive to destroy speech is irrelevant and that the state interests are unrelated to suppression of free expression (Res.Br. pp. 23, 24).

---

6 United States v. O'Brien, 391 U.S. 367 (1968).

The O'Brien holding that "legislative motive" is irrelevant was announced in the context of an attack on the facial invalidity of a statute. This case is in no way concerned with the facial invalidity of any statute.

Respondents then assert that "[s]imilarly in Young" the Court found substantial interest "even in the face of the finding of hostility to adult uses" (Res.Br. p. 24). This is legally unintelligible. If respondents mean that Young held motive is irrelevant that is not the law.[7] The last portion of Mr. Justice Powell's Young footnote four states that "an intent or purpose to restrict the communication itself because of its nature would make the O'Brien test inapplicable." 427 U.S. at 81, 82 n.4.

---

7 We refer the court to our petition, page 13, for other cases.

Turning to respondents' hostility argument, Young did not find there was official hostility to adult theaters. The pertinent finding was that the concentration of adult theaters caused blight and therefore location restrictions were justified. 427 U.S. at 55, 71 n. 4, and Mr. Justice Powell at 82 (discussed infra).

The respondents also try to avoid review by citing Graver, 336 U.S. 271 at 275 (1949), aff'd., 339 U.S. 605 at 609-610 (1950), claiming that certiorari petitions are not granted to review concurrent factual findings of lower courts (Res.Br. p. 17 n.*). Graver involved a patent case, and concerned finality where there was "conflicting testimony" of expert witnesses. 336 U.S. at 274, 275. This case involves the

First Amendment and issues of constitutional law.[8]

No Contribution To Blight; Due Process Not Applicable: Question #1

Respondents say that the "findings of blight" result from years of well-documented studies referenced in the FEIS. Respondents claim that this differentiates the Project from cases cited by petitioner such as Basiardanes v. City of Galveston, 682 F.2d 1203 at 1215 (CA 5 1982), because in Basiardanes there was "an 'empty' record" (Res.Br. p. 21 n.*).[9]

---

8 More appropriate is Bose Corp. v. Consumers Union of the United States, Inc., ____ U.S. ____, 80 L.Ed.2d 502, 104 S.Ct. 1949 (1984).

9 The Basiardanes record was empty because there was "[N]o evidence *** to bolster the City Council's assumption that the adult theater located downtown and urban blight are linked." 682 F.2d at 1215, 1216.

The respondents twist the holdings to obscure the point. The issue is not whether the studies are extensive. The question is whether the findings demonstrate a causal connection between the presence of adult uses and blight. That is the sine qua non for the government substantial interest. Young, 427 U.S. at 55, 71 n. 34. As Mr. Justice Powell states it, Young "would present a different situation had Detroit brought within the ordinance types of theaters that had not been shown to contribute to the deterioration of surrounding areas." 427 U.S. at 82.

The FEIS does make an exhaustive analysis purporting to show how sex-related uses supposedly contribute to blight and therefore must be permanently replaced by legitimate stores to rehabilitate the area. However the documents show and the district court found that

adult uses do not contribute to blight (App-46; A-51-61).

The Second Circuit holds that this is immaterial by: (a) relying on Young (but ignoring its fact predicate that adult theater concentration contributes to blight), and; (b) then applying the Berman v. Parker due process rationally related test (App-18). Schad of course rejected a due process approach in gauging the power of the government to regulate land use control, zoning or otherwise. 452 U.S. at 68, 69.

To mask the importance of this issue the respondents again try to make it sound as if this Schad holding is applicable only where there is a total or near total ban on First Amendment activities. (Res.Br. p. 20 n.*, and see p. 22).

Indeed while not stating it in precisely these terms, that part of the Second Circuit's opinion dealing with constitutional issues treats this case as if it is controlled by due process while trying to bring it within the ambit of O'Brien-Young. This unprecedented application of due process because the Project is big and involves condemnation merits this Court's review.

Least Drastic Means and Summary Judgment Conversion Without Notice: Questions #4 and #5

Mindful of this Court's staggering work load we combine these questions.

Respondents say the district court found that police sweeps focus only on one of the blight factors with limited success and therefore there is no fact issue (Res.Br. p. 25, 28 n.*).

However, what the respondents forget to add is that the district court ruled there was no fact issue on this point because it completely misread the petitioner's preliminary injunction papers.[10]

This summary judgment conversion point has consequences far beyond this case.

Rule 12(b)(6) says that if matters outside the pleadings are not excluded by the court then the dismissal motion shall be treated as one for summary judgment. The Second Circuit has re-

---

10 Petitioner's claim was: (a) that police sweeps had been successful in areas outside the Project area, not in the area (App-48), but; (b) were deliberately not used in the Project area to justify the condemnation. It is not possible to determine the latter without depositions. If there had been compliance with Rule 56 perhaps this would have been clarified.

drafted the last portion of this Rule so it reads that when the foregoing occurs Rule 56(c) and (f) shall not apply.

Contrary to respondents' statement (Res.Br. p. 29), such interpretation is in direct conflict with most circuits (see Pet.'s br., p. 20 n. 14).

Respondents cite Romero v. Int'l. Terminal Operating Co., 358 U.S. 354, 357 n.4 (1959) (Res.Br. pp. 29, 30). That case did not involve summary judgment. We do not read Romero footnote four as dispensing with a Rule 56 motion.

The Second Circuit imposes a totally unnecessary burden on litigants which most of them cannot afford. Under the Second Circuit holding every time a plaintiff moves for preliminary injunction and there is a motion to dismiss, the plaintiff must treat it as if there

was a summary judgment motion requiring additional papers. Thus they have to comply in advance with Civil Rule 3(g)[11] which is probably similiar to the rules of other district courts.

Attorneys are not going to risk being second-guessed as to whether they should "reasonably have recognized" the possibility of conversion (App-13). There is a simple alternative to this unnecesary additional work. The district court should give notice of intent to convert. That is what most circuits hold and is an issue which should be resolved by this Court.

---

11 United States District Courts for the Southern and Eastern District of New York, Civil Rule 3, Motions. Subparagraph (g) dealing with summary judgment requires that there be a separate statement of material facts disputed.

CONCLUSION

The petition for certiorari should be granted.

Respectfully Submitted,

RALPH J. SCHWARZ, JR.
Attorney for Petitioner
122 East 42nd Street
Suite 2117
New York, New York 10168

Of Counsel:
Ralph J. Schwarz, Jr.
Keith N. Costa
Stewart Stone

DATED: New York, New York
February 6, 1986